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A LEGAL ANALYSIS OF DETENTION, SEARCH OF THE PERSON, SEARCH AND SEIZURE OF PERSONAL PROPERTY, INTERROGATION AND THE ADMISSIBILITY OF CULPABLE STATEMENTS, UNDER THE CHARTER OF RIGHTS AND FREEDOMS AND THE FEDERAL YOUNG OFFENDERS ACT

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by

BRYAN WILLIAM PRITCHARD

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the requirements for the degree of Doctor of Philosophy.

Department of Educational Administration

Edmonton, Alberta

Spring, 1993

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DEGREE: Doctor of Philosophy

YEAR THIS DEGREE GRANTED: 1993

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The undersigned certify that they have read, and recommended to the faculty of Graduate Studies and Research for acceptance, a thesis entitled A LEGAL ANALYSIS OF DETENTION, SEARCH OF THE PERSON, SEARCH AND SEIZURE OF PERSONAL PROPERTY, INTERROGATION AND THE ADMISSIBILITY OF CULPABLE STATEMENTS, UNDER THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS AND THE FEDERAL YOUNG OFFENDERS ACT submitted by BRYAN WILLIAM PRITCHARD in partial fulfilment of the requirements for the degree DOCTOR OF PHILOSOPHY.

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To the Memory of my Mother and Father

ABSTRACT

The purpose of this thesis was to examine the impact the Charter and the federal Young Offenders Act may have on the operation of schools in the K - 12 educational system in Canada. Since the Charter is part of the "supreme" law in Canada and the federal Young Offenders Act has jurisdiction over provincial and federal territorial authorities, it was deemed important that this thesis address certain problems that might face school officials every day in the operation of schools throughout Canada.

More specifically, this thesis has examined the issues of detention, search of the person, search & seizure of personal property under the preamble, and sections 1, 7, 8, 9, 10 and 11 of the Charter. The issues of interrogation, and the admissibility of culpable statements of students made to school officials, was examined under section 56 of the YOA. The analysis was made within the context of actions of education authorities relative to student activities in the school setting and during school hours.

First,a legal analysis was conducted of Canadian and United States court decisions relative to the issues under review and a summary of the the findings was made. Criteria were then developed from British and Canadian

common law and specific statute law under the JDA and YOA.

A survey was then made of certain school jurisdictions throughout Canada and school policy statements were examined for analysis of interrogation procedures and the admissibility of culpable statements under the YOA. "Areas of Concern" were established relative to the issues of detention, search of the person and search & seizure of personal property. A comparative analysis was then made between the "Law" and elements contained in the policy statements. The methodological approaches of description and content analysis were utilized in the examination processes.

The analysis found that school officials do not generally adhere to the requirements of the law under the Charter and the YOA when dealing with students while under school jurisdiction.Consequently,
I have made recommendations pertinent to both law and educational administration in the hope that such will be of assistance in the formalization of equitable school policies and regulations.

PREFACE

> Education as a political weapon could not exist if we respected the rights of children. If we respected the rights of children, we should educate them so as to give them the knowledge and the mental habits required for forming independent opinions; but education as a political institution endeavors to form habits and to circumscribe knowledge in such a way as to make one set of opinions inevitable.
>
> Bertrand Russell,1927
> (1955, pp. 88-89)

ACKNOWLEDGEMENTS

First, I would like to express my thanks to my supervisor, DR. FRANK PETERS for his patience and generous gift of his time. Second, my thanks to DR. R.G. McINTOSH and DR. E. HODGSON for assisting me in the adjustment in the sometimes difficult transition from legal thinking to administrative understanding. Third, my thanks to professor A WAYNE MACKAY for agreeing to act as external examiner and to DR. L. STEWIN for acting as external departmental examiner.

My thanks also to professor GERALD L. GALL, for agreeing to act as the co-supervisor. His legal expertise added greatly to the verification of the substantive legal arguments contained in the thesis.

A special thanks to DR. DONALD RICHARDS whose sense of humour and wit was a continual source of stress relief. I am particularly grateful to DR. KENNETH WARD for his unfailing friendship throughout my residency. Many thanks, Ken.

Thanks, also, to my three new friends: Sandy, Bijaya and Schreeram. Comradery, I shall not soon forget. The four goblets will one day be raised again in friendship.

Finally, I am indebted to DONALD ANDREWS of the law firm of Cummings, Andrews and Mackay for his support and encouragement throughout the last three years of my studies.

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CHAPTER 1

INTRODUCTION TO STUDY

On April 17, 1982, Canada broke legal ties with the United Kingdom when it repatriated the constitution from British rule through the enactment of the historic Constitution Act, 1982. Embodied within the new constitution is the British North America Act, 1867, and the Canadian Charter of Rights and Freedoms, 1982.

This decision of the federal government gave Canada, for the first time, a written constitution with the independence to govern, legally, the country under the exclusive rubric of Canadian jurisprudence. The Constitution is paramount and takes precedence over all statutes enacted by any level of government whether it be federal, provincial, or municipal. It is, therefore, the "supreme law" of the land.

Section 52 of the Constitution Act, 1982, states:

> The Constitution of Canada is the supreme law of Canada and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect

Specific reference is made in section 32(1) of the Charter that the federal government the territories and the provincial governments are expressly subject to the jurisdiction of the Charter. Section 32(1) reads as follows:

> This Charter applies
>
> (a) to the Parliament and government of Canada in respect to all matters within the authority of Parliament including all matters relating to the Yukon and Northwest Territories; and

> (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province

A case that held the Charter must also have jurisdiction in all matters conducted by municipal governments was McCutcheon v. Corp.of the City of Toronto (1983). The court stated:

> First, s. 52 used the word "law" in its widest sense. When it declares that the Constitution of Canada, which includes the Charter of Rights, is supreme over "any law" that is inconsistent with it, there is no doubt that the term "law" is meant to encompass every type of law that regulates the lives of Canadians. Hence, law includes not only statute law, but also common law, regulations, and any other binding legal norms, including municipal by-laws. (pp. 202-203)

The Charter contains certain "rights and freedoms" which ensures that all Canadian citizens have certain fundamental civil liberties that are entrenched, and which cannot be taken away by the whims of the government in current power.

The entrenchment of fundamental rights and freedoms is in direct contrast to the rights and freedoms contained in the Canadian Bill of Rights, 1960. This piece of legislation is a federal statute that can be repealed, amended, or changed to any degree, by a simple majority vote in the Canadian federal government legislature. It is also limited in scope.

Changes to the Constitution are extremely difficult to institute, and virtually require consensual agreement by the federal and all of the provincial governments. Gall (1990) discussed the complexities involved in the amending formula and concluded:

> The general formula required the consent of Parliament and the legislatures of two-thirds of the provinces, provided those provinces comprise 50 per cent of the population of Canada. For some specialized listed matters, the formula requires the consent of Parliament and the legislatures of all the provinces. (p. 65)

With the advent of the *Charter*, emphasis was placed upon the individual and the collective rights of certain groups within society. Although Canadians have always enjoyed certain rights and freedoms under the common law, the *Charter*'s written entitlements facilitated a reexamination of all legal structures and organizations within Canadian society that are created by the federal, provincial, or municipal governments.

The educational system was one of such organizations that was ripe for a reevaluation as a result of the *Charter*'s broad application to social structures within society. Important questions needed to be addressed. Does the *Charter* apply to schools? Do children have rights and freedoms as stipulated in the *Charter*? Are such rights and freedoms the same as the rights and freedoms accorded or given to adult citizens?

It is a common fact that children, prior to the enactment of the *Charter* were considered, for all practical purposes, chattels of their parents. MacKay (1986) described the situation under the *Juvenile Delinquents Act,* (1909), in this way: "At common law children are not recognized as autonomous people with individual rights. Instead they were regarded originally as property of their parents and later as dependent creatures in need of protection from both their parents and the state" (p. 11).

Under the common law doctrine of in loco parentis, parental authority is transferred to school officials during school hours. Consequently, an overriding question to be addressed is: Due to the social nature of schools, do special rules apply to students?

In 1985, the federal government attempted to answer this question when it changed the legal status of children within society by repealing the Juvenile Delinquents Act,(1909) and replacing it with the Young Offenders Act (1985). (The acts, hereinafter, will be referred to as the JDA and the YOA).

Section 3(1)(e) of the YOA clearly enunciated this new status, and tied the intent of the statute with the Charter:

> Young persons have rights and freedoms in their own right, including those stated in the Canadian Charter of Rights and Freedoms or in the Canadian Bill of Rights, and in particular a right to be heard in the course of, and to participate in, the processes that lead to decisions that affect them, and young persons should have special guarantees of their rights and freedoms.

The purpose of this thesis, therefore, was to examine specific sections of both the Charter and the YOA to determine the implications of these enactments relative to the issues of "detention," "search of a student's person and personal property," "interrogation," and the "admissibility of culpable statements." Court decisions at all levels, and jurisdictions throughout Canada, were examined. Case law and statutes of other common law jurisdictions were also analyzed wherever it was deemed relevant. Since there is a considerable body of case law in the United States of America, U.S. jurisprudence was examined wherever it was deemed appropriate.

In order to ascertain the practice relating to the issues under examination at the school level, a letter was sent out to two large educational jurisdictions and two medium sized jurisdictions in the each of the 10 provinces, and 63 randomly selected smaller educational jurisdictions throughout Canada which included the Federal territories. The purpose of the letter was to elicit policy statements on the issues under examination in order to ascertain to what degree such statements appeared to conform to the requirements of the law under the Charter and the YOA.

Data emanating from a survey of 103 offices of superintendents throughout Canada in relation to policy statements were examined. Common themes were identified,the wording of policy statements was analyzed, and the substantive contents reviewed.

Purpose of the Study

The purpose of this thesis was to identify the implications of the preamble, sections 1, 7, 8, 9, 10, and 11 of the Charter, and section 56 of the YOA for school administrators and school officials by means of a detailed analysis of court decisions dealing with these matters.

Specific research questions examined were:

1. Does the preamble and sections 1, 7, 8, 9, 10, and 11 of the Charter apply to detention, search of the person and search and seizure of personal property?

2. What are the legal requirements of section 56 of the YOA relative to the issues of interrogation of students and the admissibility of culpable statements?

Significance Statement

The Charter can be graphically referred to as a "skeleton" which awaits court decisions that will add the "meat" to the legal framework within which educational institutions must operate. As can be readily seen, the Charter is a powerful instrument that can affect and challenge the decisions of those in authority within the educational system. Courts at all levels were reluctant to interfere with the internal workings of schools. It was felt that school officials were in a better position than the courts to assess the correctness of decisions in educational matters. The courts would only intervene in cases of extreme lack of reasonability or fairness.

School officials now have the difficult and onerous responsibility to reexamine school policies and regulations as a direct consequence of the enactment of the Charter and the YOA. Therefore, it has been incumbent upon the Faculty of

Education and the Faculty of Law to find ways in which to cooperate in order to ensure that the educational system adjusts policies and regulations to conform to the requirements of governing legislation.

Many of provinces have already set into motion the necessary processes to establish a two way communication between the two disciplines. One of the foremost examples emanates from the Universities of British Columbia and Simon Fraser University. Education and Law Faculties within both universities have created a foundation for the study of educational and legal issues common to both disciplines.

The common ground that gives rise to the necessary changes is that both disciplines have as their prime mandate education. Many inconsistences now exist in educational policies as a direct consequence of the Charter, and other relevant legislative enactments such as the federal YOA. It is, therefore, essential that teachers, educational administrators, parents, students and the general public be made aware of the probable consequences of the continued use of outmoded policies within the K-12 school system.

Canadians generally, and most educators particularly, do not realize the massive and profound changes that the Charter could have for education. Manley-Casimir and Sussel (1986) warned educational authorities of the dangers of inaction and the retention of outmoded concepts:

> Canada could be on the verge of a judicial revolution in educational governance similar in

> scope to what has occurred in the United States since the Brown decision. (p. 5)

Conceptual Basis of the Study

Criteria

The basis of this study was one of descriptive analysis. It was primarily conducted through the analysis of court decisions on the *Charter* and the YOA, supplemented by rationales extracted from case law in other common law jurisdictions whenever appropriate.

Theories and concepts were examined which had a bearing on the issues under consideration, such secondary sources supplementing the *ratio decidendi* in the case law. It was, therefore, a study conducted by means of legal research, the outcome being the construction of a "legal framework" based upon study of actual cases relevant to the issues, the subject matter of this thesis.

The research methodology used in the examination of the policies documents received from the offices of superintendents surveyed was that of content analysis. Content analysis is not unlike the legal analysis formulated in the legal component of this thesis. Both the legal and the educational components deal with the analysis of documents. The former analysis is concerned with examination of the rationales of judgments in court decisions, whereas the latter is concerned with the ascertainment of the content of policy statements.

The following three-step approach was implemented in an examination of the educational component of this thesis with respect to the issues of "interrogation," and "the admissibility of culpable statements."

Step 1: Formulation of criteria

Certain criteria were developed from the legal analysis of the common law relative to the issues of "interrogation" and the "admissibility of culpable statements" within the school setting.

Step 2: "Content Analysis" of the Policy Statements

A content analysis was performed on the data extracted from the policy statements received from the offices of the superintendents surveyed relevant to the criterion developed in step number 1.

Step 3: Comparative analysis between the predetermined criteria and the "Content Analysis."

A comparative analysis was then undertaken between the criteria developed in step 1 and the "content analysis" completed in step 2. The differences between the two sets of data was then analyzed and reported upon.

The end result of the comparative analysis was to find out the difference between what a competent policy "should contain" to satisfy the legal requirements under the law, and what the policies "actually did contain" relative to the issues under review.

Upon preliminary examination of the court cases on the issues of "search of the person" and "search & seizure of personal property," it became apparent that such issues were not conducive to the construction of specific criteria. This was because the court cases have affirmed that the ultimate test is that of "reasonableness" under section 8 of the Charter. What constitutes "reasonableness" differs in each specific case. Consequently, it was impossible to construct a predetermined set of criteria against which the policy statements could be compared

Thus, instead of the construction of a predetermined set of criteria, there was substituted a section entitled "Areas of Concern." Within these "Areas of Concern" the policy statements were assessed for congruence with the issues. Practical guidelines relating to the procedural process were identified from the "better" policy statements, and such processes were commented upon.

Legal Reporting Systems

In the formulation of the research methodology and the construction of a legal framework, the following procedures were instituted:

1. A preliminary examination of the relevant law was made through the use of Carswell's Canadian Abridgement,

second series. Cross referenced confirmations were undertaken through the Western.Weekly Reporting System (W.W.R.);

2. All relevant legal decisions of the provincial courts in Canada, at all levels of jurisdiction were examined, together with the underpinning court decisions;

3. An examination of the relevant Supreme Court of Canada decisions was undertaken through the use of the Supreme Court Reporting System;

4. The substantive law was verified through the use of the various reporting systems mentioned in item #1 above;

5. An examination of other common law jurisdictions, such as the United States of America, the United Kingdom of Great Britain & Northern Ireland and Australia, was undertaken, whenever appropriate, through the use of the relative reporting systems mentioned in item #1 above.

Reporting systems that were utilized appear in Appendix "A" of this thesis.

Limitations of the Study

It was not within the scope of this thesis to consider all statutes that may affect the interpretation of the Charter relative to the pertinent issues. Therefore, only the Charter and the YOA were examined. Only obiter dicta emanating from court decisions that may have relevance to the issues under review were examined.

Delimitations of the Study

This analysis was restricted to specific sections of the Charter and the YOA that may affect student rights. The rights of students in other matters of concern, which cannot be reasonably contemplated as being affected by the Charter, fall outside the scope of this thesis. The issue of corporal punishment has been expressly omitted from the thesis.

The study was also delimited in its application to the common law provinces; consideration of the civil law in Quebec was, consequently, precluded from this examination.

Assumptions

1. That the Charter applies to schools;
2. That the Young Offenders Act, 1985, applies to schools;
3. That the preamble, and sections 1, 7, 8, 9, 10 and 11 of the Charter, have relevance to schools;

Definitions of Terms

Definitions of terms appear in Appendix "B" of this thesis. Legal terms in this study have been used in their accepted legal meanings. Special meanings given to a term or concept were clarified where they occurred in the body of the text.

Black's Law Dictionary (1989) was utilized as the primary source in the construction of the list of terms in this analysis. Exceptions are noted. Other sources are sections of Acts which provided elaborations of terms.

An effort was made to translate technical legal terms into plain English. Therefore, Latin phrases and legal terms have been kept to a minimum.

Overview of the Thesis

Chapter 1 outlined the nature and purpose of the study. The significance of the analysis for both education and the law was established.

The legal component of the study was conducted within the methodological tradition of descriptive analysis. The educational component dealt with "content analysis." Limitations and delimitations were set and a list of definitions to be used has been presented in alphabetical order.

Chapter 2 examined the Canadian _Charter_ and the United States Constitution. The preamble and section 1 of the _Charter_, and issues relevant to the changes brought about as a result of the _Charter_ were discussed. The ramifications of applying United States jurisprudence to Canadian cases was discussed and relevant issues emanating therefrom, were examined.

The issues of "detention" and "search of the person" and "search and seizure of personal property" were discussed in Chapter 3. The concepts of "natural justice," "due process," and "fundamental justice" were examined and sections 7, 8, 9, 10 and 11 of the Charter were discussed.

Chapter 4 dealt with the issues of "interrogation" and the "admissibility of culpable statements." The different philosophies of the JDA and the YOA were discussed, and Section 56 of the YOA, and its subsections, were examined in detail. Case law relating to each of the subsections were examined, and the concepts of self-incrimination, voluntariness of statements, person in authority, appropriate adult, right to consult with counsel, waiver of rights, and spontaneous statements were examined.

Chapter 5 reported the findings from the analysis of the school board policies. The chapter is divided into two parts. The first section is concerned with the examination of the policy statements relating to the issues of "interrogation," and the "admissibility of culpable statements." Part 2 of Chapter 5 involved an examination of the policy statements relating to the issues of "search of the person" and "search & seizure of personal property."

Chapter 6 summarizes the study, draws conclusions, and offers recommendations in the formulation of school policies and regulations. In conclusion, further areas for examination are identified, and the need for the establishment of a compulsory program of legal studies within the Faculty of Education is discussed.

CHAPTER 2

THE CHARTER AND THE UNITED STATES CONSTITUTION

Introduction

In this chapter of the thesis, an examination is made of the changes that have been brought about as a result of the Charter.

The preamble, and sections 1 of the Charter are examined. Although case law prior to the enactment of the Charter was examined, emphasis was given to post-Charter cases. And, since there have been relatively few post-Charter cases relating to the issues under examination, an examination of the issues emanating from the application of U.S jurisprudence in Canadian cases was discussed in an "United States Overview."

Supremacy of the Charter

Section 52 of the Constitution Act, 1982, states:

> The Constitution of Canada is the supreme law of Canada and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect

The Supreme Court of Canada, in R. v. Big M.Drug Mart Ltd. (1985), clearly stated that the Charter, is an integral part of the Constitution. It is the cornerstone for the interpretation of the basic intent of the Constitution, and together with the other parts of the Constitution, is the "supreme" law of Canada.

Using the analogy of a growing tree, which was first formulated in an interpretation of the British North America Act, 1867, in Edwards et al. v. A. G. of Can. et al., [1930], this theme was adopted by the Supreme Court of Canada in Law Society of Upper Canada v. Skapinker (1984).

The Supreme Court of Canada stated that the Charter should receive a liberal interpretation, and its sections should be broadly defined in order to allow for the growth of the Charter's application to present and future generations of Canadians.

In Law Society of Upper Canada v. Skapinker (1984), the Supreme Court referred to the Charter as being the "fabric of Canadian law," and further stated:

> Flexibility must be balanced with certainty. The future must, to the extent foreseeably possible, be accommodated in the present . . . Narrow and technical interpretation if not modulated by a sense of the unknowns of the future, can stunt the growth of the law and hence the community it serves. (p. 180)

Changed Role of the Judiciary

The Supreme Court of Canada is now the final arbiter of all judicial decisions in Canada under the Constitution Act, 1982, and has the continued responsibility to settle jurisdictional disputes between the federal and provincial governments. With the advent of the Charter, a third dimension was added; the determination of individual rights and freedoms and the ability or inability of governments to encroach upon, limit, alter, or otherwise diminish fundamental human rights in a democratic society.

Gall (1990) interpreted the changed role as follows:

> Clearly a major change in our legal system relates to the role of the judiciary. Previously our judges were largely responsible for the interpretation of our laws. Although that responsibility has not changed in and of itself, what has occurred is the usurpation of the doctrine of parliamentary sovereignty by the regime under which the final say on legislative policy rests with the judiciary pursuant to the power given to judges under s.52 of the Constitution Act. This role should be contrasted with the "construe and apply" mandate given to the judiciary under the Canadian Bill of Rights, or the mandate given the courts under other human rights legislation. Plainly and simply there has been a shift from the regime of parliamentary sovereignty to a system whereby the ultimate power rests in the Constitution as interpreted by a judge with powers under s. 24 to fashion new remedies in appropriate circumstances. (pp. 84-85)

Justice D. G. Blair of the Ontario Court of Appeal (1983) succinctly stated the status of the Charter in relationship to the judiciary: "The Charter has conferred immense power on the judiciary. It has become the ultimate arbiter in Canadian society on Charter issues, legally supreme over both the legislative and executive branches of government" (p. 445).

MacKay (1985) took a rather cynical approach when he stated: "some would argue that there never really was a clear line between legislative and judicial roles and that judges have simply enhanced their political roles" (p. 331).

Thus, governments may make laws for the conduct or restraint of the peoples of Canada, but ultimately the judiciary will interpret such edicts and strike impediments down whenever necessary in order to protect those rights and freedoms guaranteed to all peoples living in Canada. The Charter does not only apply to citizens of Canada but most of the sections also apply to all individuals within Canada.

Application of the Charter to Schools

Under the provisions of the British North America Act, 1867, (now the Constitution Act, 1867), there is a division of powers between the federal government and the provincial governments.

The power to govern in the area of education was given exclusively to the provinces pursuant to section 93, and as such, this status is judiciously guarded by provincial legislatures from any attempts at intrusion by the federal government.

A prime example of this jealously guarded power of authority was contained in the decision of the House of Lords, Privy Council, in Tiny Separate School and the King, [1928]. The court stated the province's position clearly: "[the] provincial legislature is supreme in matters of education, excepting so far as sec.93 of the B.N.A. Act restricts its authority" (p.770).

Although the supremacy of the Constitution, of which the Charter is a part, is unquestionably a fact in Canadian jurisprudence, one educational scholar, albeit early in his interpretation of the Charter, had grave doubts as to its impact on Canadian society generally, and specifically in educational matters. Manley-Casimir (1982) was of the opinion that:

> While the Constitution incorporates a radically new Charter of Rights, it may not change the fundamental traditions of the country—it may not alter the pervasive deference to traditional authority, the reluctance to litigate, or the elite accommodation in political evolution. These facts will mediate the extent to which the Charter of Rights and Freedoms will serve as a mechanism for legal challenge in general, and for legal challenge to educational practice in particular. (p. 21)

MacKay (undated), in a paper on the implications of the Charter to young offenders, was of the opinion that: "There is no doubt that "anyone" in section 24 of the Charter includes children as well as adults" (p. 5). Christian (1984) felt that: "Everyone," as used in section 8 should include all human beings" (p.364), and even went on to argue that upon the authority of Southam v. Hunter (1985), interpretation of section 8 had extended to include the "legal entity" of a corporation.

Cruickshank (1986) was also more optimistic than Manley-Casimir (1982), and suggested: "that parents may be encouraged to litigate by the strength of legal challenges never before available. The results of even a few cases could change the entire fabric of Canadian public education" (p. 52).

In the mind of Anderson (1986 ii), there is not a shadow of a doubt that the Charter applies to the school environment: "there appears to be little doubt that Section 7, with its guarantee of procedural safeguards, will apply to suspensions and expulsions of students in schools and other disciplinary measures" (p. 23).

The Ontario Court of Appeal in Regina v.J.M.G.(1986, p. 111) held that teachers are bound by the Charter. On the other hand, the Alberta Court of Queen's Bench in R.v. H.(1986), stated, in obiter dicta, that if the Court had had to rule on the application of the Charter to schools, it would have held that the Charter did **not** apply to the school environment.

In R. v. Kind (1984), the Newfoundland District Court clearly felt that the Charter applied to schools:

> There is no doubt but that the object of the **School Attendance Act** is to require all children of school age to attend school subject to the exceptions and exemptions provided for in s. 8(d) and that this is a legitimate goal of government to achieve by appropriate legislation. However, by so doing it must comply with the **Charter**, subject, inter alia, to the reasonable limits referred to in s. 1. (p. 346)

The question as to whether the Charter applies to schools is still open for debate. Ultimately, the decision will rest with the Supreme Court of Canada. However, for the purposes of this thesis,it is assumed that the application of the Charter applies to education generally, and more specifically to children within the educational system.

Preamble and the Balancing Provisions of Section 1

Preamble

The preamble to the Charter states the basic premise upon which the rights and freedoms contained within the document are to be interpreted.

The preamble states:

> Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law

The "supremacy of God" expressly acknowledges that natural law is equally as important as legislative power. Legislative power is the "rule of law" which controls the activity of the peoples of Canada through the enactment of statute law.

The rights attributed to the individual under "natural law" are those basic rights that separate human beings from other beings on planet earth. Such a notion presupposes that people were made in the image of God, and that certain rights cannot be taken away from people by other people acting under the "colour of right" given to them under legislative power.

Prior to the enactment of the Charter, based upon British jurisprudence (the British constitution is mainly unwritten), most of Canadian constitutional rights were based upon the common law. The written part of the Canadian Constitution is contained in the British North America Act, 1867,(now the Constitution Act, 1982) the basis of which is grounded upon the concept of "Peace, Order, and Good

Government." Under this premise, the courts have the prime responsibility of "balancing" the division of powers between the provincial and federal governments. The Charter further mandates that there must be a "balancing" of the law that protects certain rights and freedoms of individuals within society while enabling governments to enact legislation for the greater good of society. This new form of "balancing" is to be founded upon principles that recognize the "supremacy of God" and the "rule of law."

Section 1

Individual v. Collective Rights

As discussed in the previous section, Canada has always been subject to the balance between the individual and the collective rights of society. This balancing effect is again found in section 1 of the Charter.

Section 1 states:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Gall (1990) placed section 1 in the context of traditional values associated with a typical Canadian notion of the balance between the individual and society. In so doing, he pointed out a rather startling fact, that is, that Canada may not be as democratic as it is generally perceived to be:

> Structurally, the Charter begins in section 1, with the so-called 'limitations clause' to which most other sections are referable. The theory behind having a limitations clause is that no right is absolute, and therefore the clause provides a court with a basis for placing limits on the exercise of particular rights. It is interesting to note that in the international spectrum the one right which is recognized as immune from any forms of limitation is the protection against cruel treatment or punishment. In Canada, however, that provision of the Charter is still referable to s. 1 and the limitations imposed by it.(p. 68)

Consequently, the rights of the individual are not absolute, and must be "balanced" against potential governmental rights pursuant to section 1. It is apparent, that the test for placing restrictions or limits on "rights and freedoms" is a process based upon the interpretation of the following phrases:

1. reasonable limits;
2. prescribed by law;
3. demonstrably justified in a free and democratic society.

In _R_.v._Oakes_ (1986, pp. 128-129), the Supreme Court of Canada set down a two-fold conjunctive test to determine under what circumstances a right or freedom may be infringed upon:

> The impediment to a right or freedom must be of sufficient importance and;
>
> The means used to achieve the basic purpose of the infringement was the most reasonable under the circumstances.

The evidence must be cogent and persuasive, and the methods used must be as unobtrusive as possible, relative to the nature of the right or freedom protected under the

Charter, (Supreme Court of Canada in Singh v. M.E.I. (1985)).

Watkinson (1986, p. 27) pointed out a third dimension to be superimposed upon the two-fold test: "a proportionality test" which must weigh the effects of the impediment against the objectives of the measure, in light of the "sufficient importance" criterion."

Reasonable Limits

It is evident that whatever "rights and freedoms" are guaranteed in the Charter, such are not absolute. This proposition was clearly established by the Supreme of Canada in Operation Dismantle v. The Queen (1985). The Court was of the opinion that: "even an independent, substantive right to life, liberty and the security of the person cannot be absolute" (p.55).

The meaning of "reasonable" was examined in Re Reich and the College of Physicians and Surgeons of Province of Alberta.(1984). The demand for the production of a doctor's records for purposes of a discipline action under the Medical Professions Act, was held to be a reasonable limit under section 1 of the Charter. The doctor had argued that the records contained privileged information between he and his patients and, therefore, it was "unreasonable" for the medical governing body to demand production for other purposes. The court disagreed and defined the meaning of "reasonable limits" as "rational means of achieving a rational objective" (p. 102).

It is not surprising that a reasonable limitation on section 1 was held to be the distribution of obscene materials as in the cases of R. v. Red Hot Video Ltd. (1985), and R. v. Ramsingh (1984).

In the school setting, the court held in Cromer v. B.C. Teachers Federation (1984), that a procedure instituted for the registration of one criticism against another teacher was reasonable under section 1 of the Charter.

Public law. Those legal entities wishing to invoke the balancing provisions of section 1 support the notion that it is only governmental laws that seek to restrict, alter, or impede, in some way, the right or freedom of an individual within society that are subject to challenges. Under this premise, the Charter does not have application to disputes between individual entities within society.

This position has not been universally accepted. Gibson (1983) argued against this absolute restriction. He concluded: "If the Charter applies to all levels and all branches of Government in Canada, it follows that it must apply to the laws which are created by those governmental authorities" (p. 512). Gibson (1986) continued to argue, and expand the point: "It might be possible to argue that certain activities, such as "education", are generally accepted as being governmental responsibilities, and that universities should be subject to the Charter for that reason" (p. 108).

The question appears to have been answered by the Supreme Court of Canada's decision in R.W.D.S.U. v. Dolphin Delivery, [1987]. The court stated:

> I am in agreement with the view that the Charter does not apply to private litigation. It is evident from the authorities and articles cited above that that approach has been adopted by most judges and commentators who have dealt with this question. (p. 597)

Whether the Charter will continue to be restricted to public law by way of governmental laws, or, at some time in the future, be extended into the private sector, is a matter of speculation. Consequently, this thesis will proceed on the basis that the Charter is restricted to public law.

Burden of proof. It would appear that the burden of proving that a piece of legislation that seeks to somehow encroach on the rights or freedoms of an individual within Canadian society is "reasonable" lies clearly on the government. In Quebec Assn. of Protestant School Boards v. A.G. Quebec (1983), the court held that the burden of proof lies upon the party claiming the balancing provision under section 1. Following the rationale found in this case, Watkinson (1986) felt that section 1 is further subjected to a two-stage process:

> First, they must decide whether a challenged law has the effect of limiting one of the guaranteed rights. The proof at this stage is placed upon the individual challenging the law or government action. If the court

> agrees that the challenged law limits a guaranteed right, it moves to the second stage of deciding if the limit is a reasonable one. (p. 24)

The Saskatchewan Queen's Bench in R.L.Crain Inc. v. Couture (1984), stated the case for the individual within society: "[There is] the need for compelling factors to justify placing the collective interests of society ahead of the rights of the individual" (p. 219).

Prescribed by Law

The term "prescribed by law" is a difficult concept. The word "law" is all-encompassing, and usually is a macrocosm for all areas of legal jurisprudence. However, used within the context of the Charter, and in relationship to the main notion of reasonableness, it would appear that "prescribed by law" has a specific usage.

Objective test. Anderson (1984), in contrasting section 1 with the of the common law interpretation on "reasonableness" in relation to section 23 of the Charter, was of the opinion that:

> A court is to examine the legislation and determine if the legislation, from an objective viewpoint, is a reasonable limit justified by the legitimate government aim underlying the limitation.
>
> This limitation on the rights provided by section 23 closely resembles the past common law review of the exercise of administrative or statutory powers based on the concept of "reasonableness". The section 1 review is in the context of limits prescribed by law whereas the common law "reasonableness" review is in terms of the exercise of an administrative or statutory power. Section 1 allows reasonable limits prescribed by law to be placed on section 23 rights and the common law requires that educational decisions relative to

> minority language instruction be reached "reasonably." (pp. 171-172)

Anderson (1984) went on to say that the interpretation of "prescribed by law" must also include the legitimacy of the power source, and has even argued that the meaning of the phrase must include the motives behind a piece of legislation.

Discretionary transfer of power. The legitimacy of a law was considered in a case that dealt with the transfer of discretionary power from an enabling statute to a tribunal. The Ontario Court of Appeal in Ontario Film and Video Appreciation Society v. Ontario Board of Censors (1983), stated:

> The Charter requires reasonable limits that are prescribed by law; it is not enough to authorize a board to censor or prohibit the exhibition of any kind of a film which it disapproves. That kind of authority is not legal for it depends upon the discretion of an administrative tribunal. However dedicated, and competent and well-meaning the board may be, that kind of regulation cannot be considered "law". It is accepted that law cannot be vague, undefined, and totally discretionary; it must be ascertainable and understandable. Any limits placed on the freedom of expression cannot be left to the whim of an official; such limits must be articulated with some precision or they cannot be considered to be law. (p. 67)

The Alberta Provincial Court in R. v. Bienart (1985, p. 10), held that although section 10(3) of the Department of Education Act, contravened section 10 of the Charter (Freedom of Religion section 2), such was a reasonable limitation "prescribed by law" pursuant to section 1 of the Charter.

Demonstrably Justified in a Free and Democratic Society

In order to allow for a right or freedom to be encroached upon, the basis for such an encroachment is that it must be reasonable in "a free and democratic society."

The Supreme Court of Canada held in R. v. Oakes (1986), that the reverse onus clause under the Narcotic Control Act, was unreasonable, and not "demonstrably justified" in a "free and democratic society." The Court expressly stated that the very essence of the Charter was that: "Canadian society is to be free and democratic" (p. 125).

Likewise, the British Columbia Supreme Court in R. v. S.B., [1983] considered that the Juvenile Delinquents Act, (the forerunner to the Young Offenders Act, 1985), in that it failed to allow for a trial by jury for a juvenile, was unconstitutional. It was held not a "reasonable limit" in a "free and democratic society" (pp. 529-30).

Other Modifiers in the Charter

One final consideration which must also be addressed is whether or not section 1 applies to other sections of the Charter. That is, do the specific sections, such as s. 8 "Search and Seizure" contain their own modifiers? Is "unreasonable" in the context of search and seizure different from "reasonable limits" contained in section 1?

MacKay (1985, p. 285) argues that section 1 should not be applied to any provision which contains its own limitations. Watkinson (1986) disagreed and felt that: "s. 1 will be considered regardless of whether or not a section of the Charter contains its own limiting modifiers" (p. 29).

Justice Deschenes' judgement in Quebec Assn. of Protestant School Boards v. A.G. Quebec (1983), appears to be the basis for Watkinson's position (1986). He stated: "It would require, therefore, a particularly strong argument to lead to the conclusion that one or other provisions of the Charter would nevertheless be sheltered from the limitations generally allowed by s.1" (p. 49). However, Justice Deschenes was of the opinion that there was no need to meet this criterion as "Section 23 is comprehensive and detailed and,in effect, excludes s. 1" (p. 49).

Support for this proposition also came from Whyte (1983) with reference to section 7:

> In short, it would seem that section 7 is one of the provisions of the Charter which should be applied without recourse to section 1; the sort of derogation contemplated by section 1 properly forms part of the initial process of defining "fundamental principles of justice". (p. 465)

Summary

The issues raised in the examination of the case law on the preamble and section 1 underlines the complexities involved in the interpretation of these parts of the Charter. The components involved in the concepts of "God" and "rule of law" are as wide as the legal system itself. The "balancing" of the rights and freedoms of individuals within society and the collective rights of society, as identified by governmental enactments, is equally ubiquitous.

Rights and freedoms are not absolute. It is only Public law (governmental) that is subjected to legal scrutiny under the Charter at the present. However, apart from these two basic premises very little can be stated with any degree of certainty. What is a "reasonable" limitation on the rights and freedoms of an individual will differ based upon the circumstances in each particular case.

What has been shown in this study is that the courts have struggled with the beginnings of a basic framework within which a particular set of circumstances need to be examined. First, the establishment that a right or freedom has indeed been encroached upon. Second, the burden of proving that an encroachment is "reasonable" is clearly placed upon the government. Third, the encroachment must be a "rational" one and must be held to be in the interests of the society as a whole.

Within the framework it must be established that there are "compelling factors" involved in the placing of societal needs ahead of the rights or freedoms of the individual. The test of "reasonability" must be based in "objectivity" and the governmental power base must be a legitimate one which may even extend to include the motivation behind a piece of legislation.

The complexities are further compounded if other sections of the Charter have their own modifiers. The courts appear not to be clear on this issue, except to say that there must be "strong argument" in support of the proposition that section 1 should not apply to other sections in the Charter. The examination of certain other sections that may be embroiled in this debate are discussed at more appropriate junctures of this thesis.

A United States Overview

Introduction

Due to the potential importance of a considerable body of case law in the United States, an examination was made of the issues emanating out of the application of United States constitutional cases to Canadian jurisprudence. Further, due to the fact that constitutional issues based on a written constitution are plentiful in the United States, it may very well be that the Canadian judiciary will be more inclined to make use of U.S. decisions when considering Charter issues.

Traditionally, Canada has relied on dicta emanating from the United Kingdom in all areas of the law. However, England does not, for the most part, have a written constitution and, therefore, in the area of constitutional law, there is a considerable void. Until such time as a discernible trend is perceived, the application of U.S. jurisprudence in the Canadian context must be treated with the utmost of caution.

In Law Society of Upper Canada v. Skapinker (1984), Estey, J. was of the opinion:

> The courts in the United States have had almost 200 years of this task [constitutional interpretation] and it is of more than passing interest to those concerned with these new developments in Canada to study the experience of the United States courts. (p. 180)

McConnell and Pyra (1989) tend to downplay the traditional approach in the use of English cases in the Canadian courts, and they take a more positive approach to the use of U.S. jurisprudence in Canadian decisions:

> The extensive use of American cases for the elaboration of Canadian policy appears to be additionally justified on the basis of a general similarity of the cultural and political structures undergirding both nations, and because both are common law countries with identical roles stemming from the same common law origin, Britain, and on the basis that the utilization of American precedent to resolve Canadian Charter cases is a constant practice. (p. 32)

The Ontario Court of Appeal in Regina v. Rao (1984, pp. 103-104) concluded that although there are important differences between Charter and U.S. decisions, nevertheless the experience in the United States "can be valuable."

The differences between the U.S. and Canada were emphasized by Cruickshank (1986) who pointed out that in the United States, the constitution emphasizes individual freedoms whereas Canada is concerned with the preservation of social order identified in the phrase "Peace, Order and Good Government" (p. 55).

Farley (1986, p. 28), and McConnell and Pyra (1989, p. 32), felt that U.S. decisions will play an important role in _Charter_ cases and this contention was supported by the Supreme Court of Canada in _Hunter Dir. of Investigation & Research Combines Investigations Branch_ v. _Southam Inc._ (1985).

Watkinson (1986), was of the opinion that U.S. decisions will be of particular assistance in the interpretation of "principles of fundamental justice":

> As discussed earlier, the principles of natural justice are included in "the principles of fundamental justice". Therefore the American cases dealing with the procedural due process rights of students will be of significance in interpreting the rights of Canadian students. (p. 51)

It may very well be that the opinion of the Ontario Court of Appeal in _Regina_ v. _Carter_ (1982), will prevail in the application of U.S. jurisprudence in Canadian decisions:

> As to the authorities referred to, no doubt the decisions of courts of the United States of America may be persuasive references in some cases under our new Charter but it is important that we seek to develop our own model in response to present values on the facts of cases as they arise rather than adopting the law of another country forged in response to past events. (p. 44)

Manley-Casimir (1982) was of the opinion that the main differences between the U.S. and Canadian constitutions can be found in their respective political, social, and religious institutions. The United States was born out of "rebellious" "egalitarian social ideals" (p. 18), whereas Canadian society, under Imperial rule, developed an "elitist society" the government of which was "in those hands supposedly qualified by birth and training" (p. 18).

Manley-Casimir (1982) also pointed out that:

> The historic absence of an entrenched Bill of Rights has meant that no tradition of interpreting civil rights in constitutional terms has developed in Canada.
>
> Consequently, the social-legal context of Canadian life is relatively quiescent when contrasted with the United States. Canadians typically do not use litigation as a means to redress of grievance to the extent the courts are used in the United States.(p. 19)

Citizens of the United States of America take their rights and freedoms, as guaranteed under the U.S. Constitution, very seriously. Although, no doubt the U.S. Supreme Court endeavours to balance the rights of the individual against the collective rights of society in all its decisions, the rights and freedoms of the individual take a prominent place in any deliberations.

In the granting of rights to the believers in the Amish religion to educate their own children, the U.S. Supreme Court examined the "balancing" consideration between state and individual:

> The State's interest in universal education is not totally free from a balancing process when it impinges on other fundamental rights . . . and the

> traditional interest of parents with respect to the religious upbringing of their children. (Wisconsin v. Yoder (1972), p. 205)

This "balancing effect" is not written into the U.S. Constitution as are the several balancing provisions in the Canadian Charter e. g., the preamble, section 1, and section 24.

Application of the U.S. Constitution to Schools

The U.S. Constitution has been in existence for over two hundred years and history has shown that there has been an intense struggle in the courts to define the rights of children within a democratic country. It has been demonstrated that the power lies within the interpretation of a written constitution to affect and influence school policies in a dramatic and profound way. Two of the cornerstone cases that affected education in the United States were the Brown and Tinker decisions

Brown v. Board of Education (1954), affected education in a powerful and explosive manner. The U.S. Supreme Court's decision forced the state of Alabama to change its school policies on the segregation of white and black students in schools. It pitted state and federal authorities against each other and almost triggered another civil war based on the integration issue.

Tinker v. Des Moines Independent School District (1969) witnessed the beginning of student rights. The U.S. Supreme

Court was most adamant in ensuring an equitable balance between the State and the individual:

> First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of expression at the school house gate.(p. 506)

Roos (1983), after reviewing a large portion of the U.S. cases which have given rise to educational reform, concluded:

> Thus litigation—though it is no substitute for enlightened school officials—has been instrumental in drawing attention to hidden problems and has brought to task those school officials or legislatures who have not been so enlightened. This role of litigation and the courts is well within the compass of the notion of "checks and balances" that is the heart of our Constitution. (p. 418)

U.S. Terms that may have Relevance in Canadian Jurisprudence

The following segments examine U.S. jurisprudence relative to specific issues arising out of the probable application of the Charter to the educational K-12 institutions.

Life and Liberty

The basis for the protection of rights and freedoms in the U.S.A. is embodied in the phrase "Life, liberty and the pursuit of happiness." found in The Declarence of Independence. A general description, based upon specific court decisions, was found in American Jurisprudence, 2d. Edition, Vol. 16A (1981):

> The theory upon which the political institutions and social structure of America rest is that all men have certain rights of life, liberty, and the pursuit of happiness, which are inalienable, fundamental. and inherent. This principle was, of course, expressly stated in the Declaration of Independence. In addition, the Constitution of the United States provides that neither Congress nor the states may deprive any person of life, liberty, or property without due process law, and many of the state constitutions contain similar guaranties. (pp. 459-460)

The concept of "life" and "liberty" are extremely broad in application. Freedom of the individual in U.S. society, as has been shown, is a fundamental part of both concepts. Oppressive governmental action, therefore, is closely watched by the U.S. Supreme Court.

Likewise, the Supreme Court of Canada, by virtue of its changed role under the Charter, is placed in a similar position of protecting the rights and freedoms of individuals within Canada. Consequently, an examination of U.S. jurisprudence may be helpful, even if it is only from the perspective of avoiding judicial pitfalls.

A good broad definition of "liberty" was found in the case of Meyer v. Nebraska (1923):

> Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. (p. 399)

One example of the possible application of U.S. jurisprudence relative to the application of the Charter to schools, is the notion that "liberty" includes the right to an education. It has long been established that this is the case in the U.S., (Orway v. Hargraves (1971), Doe v. Bolton (1973)), and although several Canadian cases have alluded to this position being the same in Canada, (R. v. Kind (1984), and Weinstein v. Min. of Educ. for B. C. (1985)), such has yet to be ultimately decided by the Supreme Court of Canada.

Cruel and Unusual Punishment

The U.S. Supreme Court has ruled corporal punishment not to be "cruel and unusual punishment" under the Eighth Amendment. The Eighth Amendment relating to "cruel and unusual punishment" states:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted

In the leading case of Ingraham v. Wright (1977), the U.S. Supreme Court stated:

> We adhere to this long standing limitation and hold that the Eighth Amendment does not apply to the paddling of children as a means of maintaining discipline in public schools.
>
> We find it an inadequate basis for wrenching the Eighth Amendment from its historical content and extending it to traditional disciplinary practices in the public schools.
>
> We find that corporal punishment in the public schools implicates a constitutionally protected liberty interest, but we hold that the traditional common-law remedies are fully adequate to afford due process.(pp. 664-672)

There can be little doubt that corporal punishment in U.S. schools is deeply entrenched. Only a few states have abolished its use and the data overwhelmingly support the proposition that it is still a widely used form of discipline (Pritchard, 1989).

A survey conducted by the Office of Civil Rights in the Department of Health, Education and Welfare in 1977 of a sample of 3,617 school districts comprised of 43,738 individual schools, reported that the number of formal incidents of corporal punishment was in excess of one million and a half (Rust & Kinnard, 1983, p. 91).

In a study of a medium school system in Tennessee of 10,000 students, Rust and Kinnard (1983) assessed the situation in rather strong terms:

> Educators who frequently use corporal punishment tend to be those with fewer years of experience. They were more likely to have been punished physically themselves while in school. Frequent users of corporal punishment displayed a relatively limited array of disciplinary techniques and tended to be comparatively closed-minded and rejecting of viewpoints which differed from their own. They also tended to be emotional, anxious, and impulsive. (p. 97)

Its continued use is based in traditional acceptance by society generally, and particularly stems from religious convictions of the white middle-class majority (Rose, 1984, p. 438; Pritchard,1989, pp.35-39). The underlying concept is one of authority and power of school officials over children. In a process that is referred to as "Shepardizing," seventy five pages of citations were located (in excess of five hundred cases) where the U.S. Supreme Court and other Courts of Appeal had considered or applied the principles of law embodied in the Ingraham decision.

Security of the Person

The term "security of the person" is contained in the 4th Amendment of the U. S. Constitution. The 4th Amendment also covers the search of the person, and search and seizure of personal property. This part of the U.S. Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against searches and seizures, shall not be violated, and no Warrants shall issue, but on probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Ingraham decision caused a wave of controversy in the United States. Rosenberg (1978) was one of the more vocal critics of the decision, and his words of warning may be of more importance when considering the Charter provision of "security of the person" in the school setting:

> Thus, the Ingram [sic] decision denigrates the physical and psychological integrity of children; leaves in doubt the continuing vitality of the concept of parental primacy in the sensitive area of child rearing. (p. 76)
>
> This exemption,[reasonable corporal punishment] which is not available to jailers, creates a built-in mechanism for explaining away injuries that the child receives. School authorities may assert either that the child's original misconduct was so serious that severe corporal punishment was reasonable; or that, although the original misconduct was less grave, the child resisted the paddling, necessitating the use of greater force;

> or that the resistance itself caused more severe injury. (p. 87)

"Due Process" in the School Setting

The concept of the U.S "due process" has already been examined. In this segment, greater emphasis was placed on the application of the concept within the school environment in relation to any actions that may effect the potential rights of students under the Charter. Therefore, no distinctions have been drawn between the issues of corporal punishment, search of the person, search of personal property, suspensions, or any other relevant issues pertaining to the rights of students. In other words, a generic approach was undertaken.

Stelzer (1980) believed that "due process," within the context of the school environment, involves two elements:

> Due process, in the context of the school, involves two sets of responsibilities. First, school rules must clearly specify the types of misconduct for which students will be punished. Second, school authorities must use fair procedure in determining guilt and punishment. (p. 79)

It seems reasonable that if a student is to be punished, he or she must have knowledge of those rules which, if broken, will give rise to appropriate punishment. This means that arbitrary actions on behalf of school officials must be treated as being abhorrent.

As was discussed in Goss v. Lopez (1975), a hearing prior to the implementation of disciplinary actions was deemed to be beneficial to the student in that "participation" in the process had educational value in a democratic society. Justice Powell strongly dissented in Goss, and was of the opinion that a school was not a democratic institution. The Harvard Law Review (1981) took a dim view of this position:

> The Court [in Ingraham], incorporating Justice Powell's Goss dissent in the law, rejected Goss's tenent [sic] that the primary thrust of the ideal school governance should be to mirror the larger society. Rather, the school's primary contribution to the making of citizens should be the inculcation of the rule of adherence. This view, with its concomitant belief in the necessity of order, entails a devaluation of student autonomy and participation. (p. 113)

As a protection against arbitrary and unfair actions by school officials, Justice Powell was of the opinion that: "openness of the public school and its supervision by the community afford significant safeguards against the kinds of abuse from which the Eighth Amendment protects the prisoner" (Lee, 1979, p. 286).

Lee (1979) commented on Justice Powell's statement from both a social and legal point of view:

> To the author's knowledge, no evidence was presented concerning the "openness of public schools" or the effectiveness of "common law constraints." One can only conclude that Justice Powell effectively took "judicial notice" of these factors. Certainly, looking over our own experiences, many of us would disagree with these perceptions of public education. From a legal standpoint, moreover, it is bad practice to base decisions on standards for which no evidence is presented. (p. 186)

Gunn (1974) took a particularly strong stance against the lack of due process in schools based upon the dicta in In Re Gault (1967): "It is the opinion of this author, that the absence of an informal hearing prior to the infliction of corporal punishment is no more justifiable than the "Kangaroo Court" referred to in Gault" (p. 684).

The question as to whether it is desirable to conduct a hearing before punishment is inflicted upon a student is one which has yet to be answered within the Canadian context. Views vary. The answer will depend upon how the Supreme Court of Canada views schools within the context of Charter rights. Magsino (1978) argued that: "In light of the Goss and Wood decisions of the U.S. Supreme Court, the virtual absence of due process requirements in Canadian schools might well appear scandalous" (p. 57).

Magsino's comments (1978) on the uselessness of unentrenched rights under the Canadian Bill of Rights (1960), may have greater meaning in the evaluation of future student rights under the Charter:

> In the area of basic rights - including students' welfare rights - perhaps we require a much stronger approach. It is the nature of these rights that they have to be distributed in as equitable and as liberal a manner as possible. In a society that has pretensions to democratic principles and yet is characterized by undemocratic practices and institutions (Porter, 1971), more decisive and more reform-oriented action seems called for. In this light, entrenchment of rights becomes an attractive possibility. (pp. 66-67)

Whatever criteria the Supreme Court of Canada decides upon, it would appear to be reasonably clear that even the application of the rationale in Goss will not culminate in the full protection for students that is afforded adults within contemporary society. Mass (1980), in an appraisal of the then current cases, was more optimistic than most in the interpretation of future trends:

> In the last decade the law has come a long way in recognizing the constitutional rights of students, especially the right to be insulated from the actions of administrators unhampered by fundamental principles of fairness.
>
> Indeed there appears to be a consensus of the Court willing to establish a lower standard of due process in "academic" cases and desiring an extremely narrow definition of "liberty" and "property," but this consensus is tenuous and may evaporate when faced with more troublesome fact situations than these cases have presented. (pp. 462 and 506)

Doctrine of Reasonableness

In Doe v. Bolton (1973), the U.S. Supreme Court considered the application of statute law on 4th Amendment rights of "unreasonable searches and seizures" and of "probable cause." The court reasoned that: "These rights are 'fundamental,' and we [the court] have held that in order to support legislative action that statute must be narrowly and precisely drawn and that a 'compelling state interest' must be shown in support of the limitation" (p. 211).

In a judicial review of the action of a school board, in the suspension of a student, the Arizona Court of Appeal in Tucson Public School District 1 of Pima County v. Green (1972), was of the opinion that "arbitrary, capricious and unreasonable conduct" gives rise to legal intervention. The court further stated:

> The terms "arbitrary, capricious and unreasonable conduct" so as to constitute a manifest abuse of discretion calling for judicial intervention means unreasoning action, without consideration and in disregard for facts and circumstances; where there is room for two opinions, the action is not arbitrary or capricious if exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached. (p. 864)

Sorenson (1986, p. 35) sees the correct balance between the state and the individual, in relationship to searches generally, as one between the "degree of intrusiveness" and the student's "reasonable expectations of privacy," "against the school's need to maintain a safe and orderly learning environment."

This "balancing" philosophy, and inappropriate behavior on the part of school officials giving rise to damages, was addressed by the U.S. Supreme Court in Wood v. Strickland (1975, p. 308). The court felt that where a student had confessed to "spiking" a punch bowl with alcohol, as a "prank," and where a school board had held a meeting without the knowledge of the girl or the parents, which resulted in a suspension, such acts were not done "in good faith." The Court found in favour of the student.

On the issue of the "balancing" philosophy between the state and the individual within society, C. Edwin Baker, in Jacobs' work (1983), adds a novel approach to discrimination against minorities:

> The "balancing" approach is particularly objectionable in respect of rights whose prime value is to protect individuals against the majority, to protect dissent, advocacy of social and political change, personal beliefs and values. When these are in issue, to inquire what mainstream society thinks is reasonable is essentially to go against the entire thrust or meaning of the constitutional rights provisions. (p. 612)

As can be readily seen, the issues emanating out of the application of U.S. jurisprudence to Canadian court cases are many. The U.S. and the Canadian constitutions are not the same. Accordingly, great care should be taken when considering United States jurisprudence in light of Canadian law.

Summary

This chapter has shown the complex nature of the application of *Charter* generally, and specifically the interaction of the preamble and section 1 with school issues.

Application of U.S. jurisprudence to the Canadian context was examined, and the issues emanating therefrom were discussed.

The implications of other sections of the *Charter* to the educational system is the subject matter of the Chapter 3.

CHAPTER 3

DETENTION, AND THE SEARCH OF THE PERSON AND THE SEARCH AND SEIZURE OF PERSONAL PROPERTY

Introduction

Since "detention" is usually the first step in the process of interrogation, search of the person, search & seizure of personal property and the admissibility of culpable statements, an examination of sections 9 and 10 of the *Charter* was the subject first to be examined in this chapter. Prior to such analysis, however, a brief examination of the changing role of the educator was undertaken in order to add clarity to the issues.

Section 8 of the *Charter* was then examined relative to the issue of search of a student's person, and the search and seizure of a student's personal property. To this end, an analysis of the interaction of sections 1 and 7 with section 8 of the *Charter* was undertaken wherever it was deemed appropriate.

Changing Role of the Educator

In Loco Parentis

Traditionally, the role of the school official when dealing with students emanated from the transfer of authority and power from parents to the educator under the common law doctrine of *in loco parentis*.

Over the last several decades, there appears to have been a shift from school officials acting on behalf of parents to statutory authority stemming from various provincial statutes. For example, sections 13 and 15 of the Alberta School Act, 1988, requires that both teachers and principals maintain discipline in schools.

This tug-of-war between parental and statutory authority was clearly identified in two leading educational court decisions: R. v. H.(1986) and R.v. J.M.G.(1986). Dickinson (1989) in considering R v. H.(1986), characterized the apparent role conflict of school officials as a "Jeckyll-and-Hyde legal personality," and concluded that section 10(b) of the Charter does not apply to "normal disciplinary measures within schools"(p. 205).

The Ontario Court of Appeal in R. v. J.M.G. (1986), appeared to lean towards the proposition that school officials are not "persons in authority," and yet the rationale for the decision was grounded in statute law.

MacKay and Sutherland (1992), discussed this apparent role-conflict, and concluded:

> Grange J. A. upheld the search as reasonable, although he did not specifically address whether the authority to search stemmed from the common law doctrine of in loco parentis, or as an implication from the statutory duty to maintain order and discipline. The latter is the more realistic analysis and the one that allows the student to call in the aid of the protection against unreasonable searches.(p. 76)

Agent for the State

MacKay (1986b) clearly supported the position that statutory authority takes precedence over the transfer of authority to school officials under the doctrine of *in loco parentis*: "Statutory authority has legally replaced the common-law concept of *in loco parentis* as the core of educational authority" (p. 74)

The Alberta Queen's Bench in *R*. v. *M.H*.(1986), (referred to at trial level as *R*. v. *H*.), clearly identified, at least in criminal matters, that school officials are subject to the statutory authority of the YOA. The YOA was specifically named as being the appropriate statute which governed the case at bar, and the court stated, in *obiter dicta*, that *Charter* rights were not in issue.

Bala (1988) believed that the *Charter* may still be alive relative to criminal proceedings: "It can be argued that at least in the context of the criminal proceedings, the school official was an "agent of the state" and obliged to comply with ss. 8 to 10 of the *Charter*"(p. 65).

MacKay and Sutherland (1992) were of the same opinion: "If an educator, acting as an agent for the police, detains a young person for questioning he may be required to comply with the requirements of section 10(b) of the *Charter*" (p. 78).

Detention

Section 9 of the Charter states:

> Everyone has the right not to be arbitrarily detained or imprisoned

Section 10 of reads:

> Everyone has the right on arrest or detention(a) to be informed promptly of the reasons therefor;
>
> to retain and instruct counsel without delay and to be informed of that right; and
>
> to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.

The meaning of "detention" under the Charter is different from the usual meaning ascribed to detention in the school setting. Detention as a punishment in the form of correction handed out by school officials after an infraction of school rules or regulations, appears not to fall under the ambit of sections 9 and 10 of the Charter.

As previously discussed, in R.v. H. (1986), the Alberta Court of Queen's Bench held that in criminal matters, the YOA applied to a young person. Consequently, there was no need to consider the application of the Charter on the issue of detention in school matters. In so deciding, the court stated, in obiter dicta, that the Charter would not apply to young person in criminal matters: "having regard to the provisions of the Constitution Act,the School Act and other authorities in legislation" (p.3).

It is unclear as to exactly what the judge meant by such statement, as the substantive content could be characterized as a sweeping generalization, and most certainly lacking in specificity. However, it is not necessary to understand what the judge meant by this vague statement, as the ratio decidendi (the reason for the decision) was clearly stated: "However, that is not necessary for my decision. The Young Offenders Act is the one which in my view, governs this appeal (p.3)." The court held that statements procured without complying with the provisions of section 56, were inadmissible.

In R. v. L.L. (1986),the District Court of Ontario, on appeal from the Family Division of the Provincial Court, decided that even in cases of detention, in the sense of a criminal "arrest" and "detention" contemplated by section 10 of the Charter, such had no application in the school setting if the actions of the school officials could be characterized as "administrative," and not criminal from the outset.

In Queen v. Sweet (1986), a decision of the Ontario District Court, it was held that even physical force may be used on a student if the student attempts to escape detention, even though the student was an adult. The court was of the opinion that it was the duty of the teacher to maintain "discipline" under the provisions of section 236(a) of The Education Act, of Ontario, and further stated that the detention was "eminently reasonable" under the circumstances.

In matters that are clearly within the criminal law, it is reasonably clear that a young offender must be afforded the same rights an adult. The Canadian Bar Association (1986, p. 6) stated: "An accused should not be detained without a fair hearing. The rights of an accused person must not be sacrificed on the alter of expediency : R. v. Hajdu (1984, Ont. H.C.J)" (p. 6). This position was also taken by the New Brunswick Court of Queen's Bench in R. v. Robichaud (1984).

Bala and Lilles (1984) felt that "detention" in the criminal context must afford the maximum protection the courts can muster especially where a "confession" is the issue. They were of the opinion that:

> It is recognized that children and young persons are especially susceptible to being influenced by authority figures such as a police officer in uniform, a probation officer, a social worker or school principal; young persons are open to suggestion and may easily adopt a statement offered by a person in authority as their own. A young person who is arrested and placed in detention without being able to talk to his parents or a friend may be induced to confess merely to relieve his anxiety. (p. 369)

Regarding the "right to counsel" under section 10(b) Cromwell (1984) was of the following opinion:

> Section 10(b) of the Charter applies only to those who have been arrested or detained and will be of no assistance where the individual has not been arrested or detained. Accordingly, the Charter right to counsel provision is much more restricted than that provided for under the Young Offenders Act. (p. 14)

Since it would appear that sections 9 and 10 have no application in the school setting, and since the rights under section 11 are predicated upon the application of section 10, it would appear fruitless to consider section 11 at this juncture.

A comparison will be made of the rights under section 11 of the Charter and those rights afforded students under section 56 of the YOA in the final chapter of this thesis.

Summary

It would appear that "detention" in the sense of punishment handed out by school officials, and also "detention" prior to interrogation of a student, are not subject to the provisions of section 10 of the Charter. This position is based upon the premise that school officials are acting under administrative law and not under the criminal law, even if the detention and subsequent happenings result in a criminal prosecution against the student.

The question of whether the school official is acting in the capacity of an "agent of the state" in matters that turn out to be of a criminal nature, is somewhat obscure. The situation would appear to depend upon the mind set of the school official. It would appear that even if the school official "should have" known that the detention was the first step in a criminal investigation, if the court perceives that the actions were administrative in the first instance, then all of the subsequent happenings will, most likely, be held to be administrative in nature.

The condition precedent appears to be the ascertainment of the "intention" of the school official from the onset of the process. In other words, if the actions of the school official are deemed to be administrative from the outset, even when the obvious consequences are criminal in nature, then all of the parts of the process will be held to be administrative and not subject to Charter rights or the jurisdiction of the YOA.

Search of the Person

Introduction

Before proceeding with an examination of section 8 of the Charter which deals specifically with "unreasonable" search and seizure of the person and personal property, it is necessary to consider the implications emanating from section 7.

The concepts of "life and liberty" and the "security of the person" also have application for searches in the school setting. These concepts must also be considered under the general rubric of the phrase, "principles of fundamental justice" which is also contained in section 7. A brief review, therefore, was a prerequisite to any meaningful analysis.

Section 7 of the Charter states:

> Everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice

Life and Liberty

Since the terms "life" and "liberty" have been the subject of analysis in countless U.S. cases, an examination of these terms was undertaken in Chapter 2. The United States Constitution is very different in many respects, and it is unlikely that the same fervor will be associated with these terms in Canada.

Since Canada has been subjected to rule of law under "Peace, Order and Good Government" it is likely that Canadian interpretations will be pale in comparison to those in the United States. There appears to be little Canadian case law on this subject matter.

Security of the Person

The term "security of the person" is a concept which may have far reaching effects within Canadian society. It may include rights affecting not only the physical body of the person but may also include rights in areas of employment and property.

In Queen v. Fisherman's Wharf (1982, p.307), the New Brunswick Queen's Bench gave an extremely wide and liberal interpretation to "security of the person." The court held that loss of livelihood was an infringement of "security of the person."

There can be little doubt that, as a consequence of such a wide interpretation, the more narrow application to the physical body of a person must be included within the concept of "security of the person." The issue of whether the legal rights contained in sections 7 to 14 inclusive are ones subject to procedural or substantive rights, or both, are addressed under the heading "fundamental justice" in an upcoming section of this thesis.

Basis for Interpretation

As with the Charter generally, the Supreme Court of Canada has advocated that section 7 should be subjected to a wide and liberal interpretation. In References Re s.94(2) of the Motor Vehicle Act (B.C.) (1986, p. 274), the Court subscribed to the principle that section 7 should be interpreted in a "generous" rather than a "legalistic" manner. In striking down an absolute liability section under section 94(2) of the Motor Vehicle Act (B.C.), the Supreme Court of Canada ruled that sections 8 to 14 inclusive, are tied into section 7 and,in using a "living tree" analogy, supported an expansionary attitude to the terms "life," "liberty," and "security of the person."

Physical Force

Although Watkinson (1986) primarily based her opinion on U.S. jurisprudence, she advocated the following proposition when physical force is used by teachers on students:

> There can be little doubt that corporal punishment is physical punishment. Therefore it is submitted that, at the very least, the courts will agree that corporal punishment is a violation of the right to either "liberty" or "security of the person," if not both. (p. 93)

Whyte (1983) also supported this specific contention, and in an analysis of the dicta in the earlier Charter cases, he came to the conclusion that a wide and liberal interpretation of section 7 of the Charter was being utilized by the courts. He stated:

> The rights referred to in section 7 arise in respect to any invasion of personal security (however defined) regardless of whether the process causing it is criminal or civil, judicial or administrative. In the absence of structural limitations the question posed by 'security of the person' is whether the phrase includes such things as livelihood, property, family, and other relationships, patterns of daily life, and generally matters which are essential to a person's capacity to act as an autonomous being. (p. 473)

Madam Justice Bertha Wilson, in the Supreme Court of Canada in Singh v. Minister of Employment and Immigration (1985), confirmed that, in her view, section 7 applies not only to the use of physical force against a person, but also the threat of the use of physical force. She stated: "security of the person must encompass freedom from the threat of physical punishment or suffering as well as freedom from such punishment itself" (p. 55).

Principles of Fundamental Justice

Introduction

The issue of whether the legal rights contained in sections 7 to 14 inclusive are ones subject to "procedural" or "substantive rights," or both, is an extremely difficult one. It would appear that the framers of the *Charter* wanted to avoid the problems associated with the U.S. term "due process," and further decided not to restrict "fundamental justice" to the British doctrine of "natural justice". It is, therefore, essential to understand the nature of each of the terms.

After a discussion of the doctrines of "due process" and "natural justice", an examination of the available case law was undertaken on the Canadian term "fundamental justice." Opinions of legal and educational scholars were also examined.

British: "Natural Justice"

Under British common law, one of the fundamental legal doctrines in criminal law is that no one can be found guilty, and subsequently punished, without a fair and impartial hearing. The Latin terms *nemo judex* (free from bias), and *audi alteram partem* (the right to a fair hearing) are the bases of "natural justice."

Free from Bias

Gall (1990) expressed the importance of the common law doctrine of nemo judex as it relates to tribunals as follows:

> [The] rule requires the exclusion of all forms of bias from tribunal proceedings. If actual bias is proven or if there is reasonable apprehension of bias the invocation of this rule of natural justice renders a tribunal's decision null and void.
>
> Although the requirement that a given tribunal conduct its affairs in accordance with natural justice applies only to judicial or quasi-judicial tribunals, recent case law suggests that,even if a tribunal's function is not categorized as judicial,or quasi-judicial, the courts will treat bias as an abuse of power and nullify the decision. (p. 361)

The Right to a Fair Hearing

In Britain, "natural justice" applies only to procedural fairness, although the term encompasses more than the act of honesty (Ridge v. Baldwin, [1964]). The concept also covers the right not to be subject to arbitrary decisions.

In R.v. Hajdu (1984), the court expressed this sentiment: "An accused should not be detained without a fair hearing. The rights of an accused person must not be sacrificed on the altar of expediency" (p.563).

In the school setting, Manley-Casimir (1978), pointed out that the act of administering corporal punishment is a discretionary power and therefore is subject to the possibility of the application of arbitrary judgment on behalf of school officials. The balance between the rights of the school official and the rights of a student is a delicate one, and as Manley-Casimir (1978) has pointed out, the student is at the mercy of the school official: "The vulnerability of the student to arbitrary action is a major justification for regarding the administration of discipline as a matter of discretionary justice" (p. 85).

Again, the balancing act between the individual and the school official was present.

Bezeau (1989) was of the following opinion:

> Although it is widely expected that the legal rights provisions in our constitution will impose procedural fairness on school disciplinary proceedings, the trend towards greater recognition of student rights predates the *Constitution Act*, 1982 , and fairness toward students is increasingly being seen as a professional obligation by teachers and school administrators. On the other hand, procedural fairness can be costly and time consuming, and so the extent of its recognition in schools depends on the severity of the penalties that can be inflicted. (p. 285)

United States: "Due Process"

In the United States of America, the concept of "due process" under the constitution covers more than the concepts of "free from bias" and "procedural fairness" to be found within the British doctrine of "natural justice."

The U.S. courts in applying the constitutional provision dealing with individual rights have found that, in certain circumstances, such rights are of a substantive nature.

In Baker v. Owen (1975), a corporal punishment case, following the decision in Goss v. Lopez (1975), the U.S. Supreme Court set down the minimum guidelines to be applied to "due process" generally:

1. The student must be advised of the specific misbehavior;
2. Corporal punishment cannot be used as the first form of discipline;
3. Corporal punishment must be applied in the presence of a second official;
4. Advice must be given to the parents, and the student, as to the reasons why corporal punishment was used.

Both the Baker and the Goss cases stand for the proposition that school officials must grant "due process" to students in an educational setting. The Goss decision emphasized the importance of the "participation" of both the educator and the student in the process which seeks to penalize the student. The court was of the following opinion:

> requiring effective notice and informal hearing permitting the student to his version of the events will provide a meaningful hedge against erroneous action. At least the disciplinarian will be alerted to the existence of disputes about facts and arguments about cause and effect. He may then determine himself to summon the accuser, permit cross-examination, and allow the student to present his own witnesses. In more difficult cases, he may permit counsel. In any event, his discretion will be more informed and we think the risk of error substantially reduced. (p. 741)

In direct opposition to the Baker and Goss decisions was Ingraham v. Wright (1977). The notion that it is necessary to grant due process to students was dismissed by the U.S. Supreme Court. The primary basis for the Supreme Court's decision was that to legislate that hearings must be held in all instances would be disruptive to the processes involved in school administration.

However, the Ingraham decision appeared to go much further than to state that "due process" is not applicable in the school setting. The decision appears to have muddied the waters somewhat, in that it advocated "collective" rights as opposed to "individual" rights when contemplating the processes that govern educational administration.

In decrying the philosophy embodied in the Ingraham decision, the Harvard Law Review (1981) stated:

> Goss defines legitimacy in individualistic and legalistic terms, a view consistent with the "new property" thesis [the value of individual self worth] developed during the late sixties and early seventies. Ingram [sic.] and Horowitz shift emphasis from individual towards communal processes. Thus seen, these two cases are not merely a retreat from Goss, but a radical break with the traditional mode of due process analysis. (pp. 1119-1120)

As previously stated, the backlash to the Ingraham decision continues to this day, and those who opposed the rationale of the case would, more than likely, agree with Rosenberg's (1978) whose pointed, if not sarcastic comment, stated:

> An undercurrent of authoritarianism pervades the majority of opinion in Ingram [sic.]. Unquestioning obedience is deemed essential, lest the pupils lose respect for their teachers and the educational system deteriorates to the point of anarchy. As simple a procedure as a minimal due process hearing before imposition of a beating is viewed as potentially disruptive of an orderly classroom. (p. 97)

Mass (1980), after reviewing several of the cases since the Ingraham decision, concluded that:

> Indeed there appears to have been a consensus of the Court willing to establish a lower standard of due process in "academic" cases, and desiring an extremely narrow definition of "liberty" and "property", but this consensus is tenuous and may evaporate when faced with more troublesome fact situations than these cases have presented. (pp. 449-462)

Canadian: "Fundamental Justice"

Before the federal government submitted the final draft of the Charter to Parliament, the United States situation was researched. As a result of the legal turmoil as illustrated in the aforegoing segments, the drafters carefully avoided the term "due process" and instead substituted the phrase "fundamental justice" into section 7 of the Charter.

Section 7 states:

> Everyone has the right to life, liberty, and security of the person and the right not to be deprived except in accordance with the principles of fundamental justice

The term "fundamental justice" was the subject of examination by the Supreme Court of Canada in Reference Re S 94(2) of the Motor Vehicle Act (B.C.) (1985). In this case, the court stated that "fundamental justice" was not the same as "due process" and neither was it the same as the British term of "natural justice." According to Tremblay (1984, p. 204), the Supreme Court of Canada managed to confuse the differences between the British "natural justice" and the U.S. "due process," and coined a new phase "substantive due process."

In a rather convoluted judgment, the Court struggled with the distinction between the concepts of "substantive," "procedural," and "due process." Tremblay (1984), before the case was officially reported on in 1985, was of the opinion that the dichotomy between substantive and procedural need not have been considered:

> We do not have to ask whether Section 7 of the Charter protects only procedures or also affects the substantive content of the law. The question must be whether a law which interferes with any of the fundamental rights enumerated in section 7 of the Charter does so in accordance with the principles of fundamental justice that we find in our common law tradition. The principles can deal with procedural content of the law such as a fair hearing, or with the substantive content of the law, such as the requirement of mens rea as a constituent part of crime. (p. 252)

Finkelstein (1986) also argued that choosing between the dichotomy of substantive and procedural rights was inappropriate within the Canadian context:

> The substantive/procedural dichotomy narrows the issue almost to an all-or-nothing proposition. Moreover, it is largely bound up in the American experience with substantive and procedural due process. It imports into the Canadian context American concepts, terminology and jurisprudence, all of which are inextricably linked to problems concerning the nature and legitimacy under the U.S. Constitution. That Constitution, it must be remembered, has no s. 52 nor has it the internal checks and balances of sections 1 and 33. (pp. 1185-1186)

Finkelstein (1986) further argued, that in addition to the inappropriateness of the substantive/procedural dichotomy, the courts are faced with a more relevant "balancing act":

> The task of the Court is not to choose between substantive or procedural content per se but to secure for persons "the full benefit of the Charter's protection," under section 7, while avoiding adjudication of the merits of public policy. (p. 1186)

Manning (1983) has a compelling argument for not restricting section 7 to procedural fairness:

> If the phrase "principles of fundamental justice" in section 7 is interpreted as being limited to determining procedural fairness, that kind of review involves no more than the court examining a legislative enactment and determining whether the specific individual could suffer the right contained in the section. (p. 140)

Manning (1983) further postulated that such an interpretation of section 7 would change the usage of section 1:

> If "principles of fundamental justice" in section 7 are restricted to procedural matters then in order to guard against irrational and arbitrary abuse by the government to protect us against the kinds of laws just referred to, [procedural compliance having a substantive outcome] resort will have to be had to section 1 and a substantive due process concept. (pp. 140-141)

MacKay (1985) is quick to point out the other side of the argument:

> A substantive approach to "fundamental justice" would unduly politicize the courts and thus reduce their credibility . . . . mandating that courts assess the merits of legislation against ill-defined substantive standards of "fundamental justice" would take courts outside their usual terrain and put them in direct conflict with the legislators on a regular basis. (p. 297)

MacKay (1985) may be stating the obvious. However, some might argue that to be in conflict with legislators is the prime constitutional function of the Supreme Court of Canada.

In the educational context, Beckton (1982) believed that whether or not substantive or procedural applied, a "new" approach was needed in the school setting. He was of the opinion that: "It seems, then, that due process [Canadian style] is premised upon fundamental notions of fair play - - that there is something reprehensible about making decisions which affect an individual unless it is done in what is considered to be in a fair fashion" (p. 156).

Beckton (1982) went on to conclude:

> The new concept of fairness has likely been the motivating force for new statutory provisions giving more rights to students. It is no longer satisfactory to say without more, the action is for the good of the child or the school. Fairness is required now in the exercise of most administrative functions in the educational process, which could have an adverse effect on individual rights. (p. 180)

Summary

There are strong arguments both pro and con as to what will be included in the interpretation of section 7 of the Charter. Suffice it to say, if the courts hold that section 7 is subject only to procedural fairness as in the British line of reasoning accepted into R. v. Hajdu (1984, Man. C.A.), and not the substantive interpretation, left unclear in Reference Re S 94(2) Of the Motor Vehicle Act (B.C.) (1985, S.C.C.), such a position would seem to defeat the basic intent of the

Charter. That is, to ensure protection for Canadians against unfairness by government action, regardless of what form it takes.

Section 8 of the Charter

Introduction

Before commencing with a detailed discussion of section 8, it would be helpful to determine the necessary grounds upon which a search may be implemented. Therefore, case law will be examined on the common law requirements, and the modified requirements of the common law, when dealing with students in the school setting.

After the "grounds" for a legal search have been identified, a further prerequisite to any meaningful examination of section 8 is to consider whether the doctrine of reasonableness applies in the same way as it did to section 1 of the Charter. In other words, is the word "unreasonable" as used in section 8 the reverse of "reasonable" as used in section 1?

This question may at first appear to be irrelevant. However, when placed within the context of judicial reasoning, it is an essential prerequisite to any meaningful discussion. For example, the Alberta Court of Appeal in R. v. Heisler (1984) held that although, a search was found to be illegal, it was, nevertheless, "reasonable" under the balancing provisions of section 1 of the Charter.

Grounds for a Search

Probable Cause

The term "probable cause" has its roots in criminal law. The term "reasonable and probable grounds" is used interchangeably." It is the requirements of the common law to which a peace officer must adhere before conducting a search of either the person or personal property. In R. v. Stevens (1983) the Nova Scotia Court of Appeal clearly stated the law relative to police searches:

> In my opinion, no police officer has the right to search any person based upon suspicion alone. He must have reasonable and probable grounds for believing that the suspect is committing or has committed an offence . . . . If the police officer searches on suspicion alone he has committed an illegal act, and one that, in my view, would be within the meaning of "unreasonable" in s. 8 of the Charter. (p. 11)

In R. v. Rex.(1983), the police acted on a tip that an accused possessed firearms and conducted a search of the accused's premises. The court held that a search without a warrant was "unreasonable" under section 8 of the Charter.

Reasonable Suspicion

Does the doctrine of probable cause apply to a search made within the school setting when the search is made by school officials?

It is clear in the common law that a peace officer cannot commence a search upon suspicion alone. This appears not to be the case even where adult non-students are the subject of a search on school property conducted jointly by the police and school officials.

In R. v. Bent,[1987] a school principal questioned two non-students who were in a washroom at his school. The principal called the police, and then ordered the two men to empty their pockets, and actually physically checked the pockets of the two detainees. Cannabis resin was found. The court held that the search had been made on "suspicion" alone, and not on "reasonable and probable grounds." The court found the search not to be a violation of section 8, and further denied exclusion of the evidence under section 24(2) of the Charter. The evidence was admitted on the basis that such would not bring the court into disrepute.

Likewise, in a decision of the Provincial Court of Ontario, on appeal to the Ontario District Court, it was held in R. v. L.L. (1986) that where a student was ordered to empty his pockets in a search for stolen money which resulted in the finding of drugs, such a "voluntary compliance" was not unlawful. The search was based on second-hand information. Even so, the court concluded: "The school authorities had good reason to question L. with respect to the theft. They did not intend to obtain evidence for the purpose of criminal prosecution but only to help L. himself" (p. 5).

In the United States, this issue has been the subject of much litigation. The leading case of New Jersey v. T.L.O.(1985), which was referred to in the J.M.G. case as "direct authority on this point"(1986, p.109), clearly ratifies the accepted notion that "reasonable suspicion" is acceptable in the school setting over the "probable cause" requirements of the 4th Amendment: (Moore v. Student Affairs Committee of Troy State (1968), People v. Jackson (1971), State v. Baccino (1971), M.M. v. Anker (1979)).

Although "reasonable suspicion" has yet to be defined by the courts (Flygare, 1985, pp. 504-05), it is evident that the criterion is satisfied where there is police involvement initiated by the police, (State of Washington v. McKinnon (1977)), or when the school official has called in the police, as in the case of In Re.C.(1977). In searches made on behalf of a third person (another school official), mere suspicion is unreasonable according to an aging decision in Phillips v. Johns (1930).

In instances where drugs are involved, at least in the United States, justification for searches is very low as in the case of an anonymous "tip" in Mercer v. State of Texas (1970), and the use of dogs in a "sniff search" has been found to be reasonable in certain instances: (Horton v. Goose Creek Independent School District (1982)).

Summary

It is clear that the doctrine of "probable cause" or "reasonable probable grounds" applies to the conduct of peace officers when acting alone.

In the case of adult non-students, while on school property, it would appear that such students are subject to the "reasonable suspicion" doctrine.

The lesser onus of "reasonable suspicion" appears to be an even more acceptable in the situation where school officials search students who are not adults, and who are under the direct control of the educational institution.

The J.M.G., R. v. L.L. and the Bent cases appear to have granted a power of authority to school officials which exceeds the authority and power extended to the police force. This situation is perhaps indicative of the special nature of the school within society, a point of law which ultimately must be addressed by the Supreme Court of Canada.

Doctrine of Reasonableness

Section 8 of the Charter states:

> Everyone has the right to be secure against unreasonable search and seizure

The word "unreasonable" in section 8, not only has to be contrasted against "reasonable limits" contained in section 1, but it must also fall within the ambit of "security of the person" pursuant to section 7, which is further subject to being tempered by the meaning of "fundamental justice."

It was, therefore, necessary to first examine the case law, both pre-Charter and post-Charter, relative to the issue of what is "reasonable" and what is "unreasonable" within the context of search and seizure.

Search of the Person

Pre-Charter Cases

Prior to the Charter of Rights and Freedoms, "search and seizure," in criminal matters, was instituted by the issuance of a warrant authorized pursuant to section 443 of the Criminal Code. The issuance of the search warrant was dependent upon the peace officer making a written statement, under oath, that the officer on "reasonable grounds," believed, that the search was justified based on the stated evidence.

Justice Dickson in Hunter Dir. of Investigation & Research Combines Branch v. Southam Inc. (1985) decision, stated the case before the advent of the Charter:

> Anglo-Canadian legal and political traditions point to a higher standard. The common law required evidence on oath which gave "strong reason to believe" that stolen goods were concealed in the place to be searched before a warrant would issue. Section 443 of the Criminal Code authorizes a warrant only where there has been information upon oath that there is "reasonable grounds to believe" that there is evidence of an offence in the place to be searched.(pp. 252-253)

Post-Charter Cases

Section 8 presented great difficulty to the Supreme Court of Canada in the Hunter case. The question of whether search and seizure was a "reasonable limit " under section 1 was not expressly pleaded, and, therefore, the court sidestepped the issue:

> I leave to another day the difficult question of the relationship between those two sections [ss. 1 & 8] and, more particularly, what further balancing of interests, if any, may be contemplated by s. 1, beyond that envisaged by s. 8. (p. 254)

The decision did, however, stand for the proposition that a warrantless search is _prime facie_ "unreasonable," and the Court also applied the rationale from U.S. jurisprudence to the concept of "unreasonableness" under section 8.

Fontana (1984) was of the opinion that section 8 of the _Charter_ is founded upon the following considerations:

> Section 8 is deceptively concise indicating that the words used in the section have been chosen by Parliament with care and deliberation. The keystone of the section is the word "unreasonable" which denotes, in the circumstances, that the drafters intended an element of flexibility in its application. (p. 293)

Based upon the aforegoing discussion of the _Hunter_ case, the Supreme Court of Canada required that courts decide future _Charter_ cases, upon the facts in each particular set of circumstances, whether the needs of society must prevail over the needs of the individual, or vice-versa, pursuant to section 1 of the _Charter_.

Searches by Private Persons

The case law seems reasonably clear with respect to searches by private persons. In _R._ v. _Lerke_ [1986], the Alberta Court of Appeal, in condemning the search of an accused by an employee of a tavern, stated that: "any search of the person, even if courteously conducted, is a serious intrusion of personal privacy and a serious breach of one's Charter rights if invalid" (p. 400).

This position was alluded to in R. v. Soenen (1983) and extended to searches by police officers where the search is conducted on suspicion alone.

Searches by Agents of the State

Fontana (1984) further pointed out that any searches (including those conducted by school officials) are illegal, if the following interpretation is correct: "[Dambrot,1983] postulates . . . that the Charter s.8 may be applicable only to those searches conducted by or on behalf of the Crown or its agents and not to searches by private persons" (p. 296).

In R. v. Stevens (1983), it was held that: "If the police officer searches on suspicion alone he has committed an illegal act, and one that, in my view, would be within the meaning of unreasonable in s.8 of the Charter" (p. 11).

The same reasoning was followed in R. v. Alainga [1985] and Regina v. Mutch (1986). The latter case confirmed the situation both before and after the enactment of the Charter: The court stated:

> In my opinion, this evidence would be excluded without the passing of the Canadian Charter of Rights and Freedoms (s.8). Now that the Charter is in place, it is even less likely that evidence that Constable Schamborski found on the appellant is admissible. (p. 480)

Strip Searches

Police Authorities

Prior to the enactment of the Charter, the criminal law did not provide a statutory base for the police to conduct a search of a person as an incident to arrest (Manning, 1983, p. 297), except in the case of weapons or drugs. Indicative of this position, was the Alberta Supreme Court's decision (now the Court of Queen's Bench) in Reynen v. Antonenko et al. (1975), where the Court held that a search of a person's rectum for drugs was not a "trespass to the person."

Manning (1983, p. 297) contrasted this position in Canada against the U.S. position in Rochin v. California (1952), wherein the U.S. Supreme Court held that the removal of a heroin capsule from the stomach of a person "shocks the conscience of the community." This major difference between the two countries is an example of the underlying philosophical basis for each respective constitution. Although,it may be questionable in 1990s, whether or not the U.S. Supreme Court would come to the same conclusion in light of the now present major drug problem, it would perhaps still be reasonable to assume that individual rights in strip searches would be more protected in the United States than in Canada.

Since the enactment of the Charter, there appears to be no change in the judiciary's approach to the search of the person. Upon arrest, an accused is still not necessarily the subject of a strip search. In R. v. Morrison (1985) the court stated:

> The case law shows that the power to search on arrest knows certain limits. It does not automatically include, for example, the right to take samples of body fluids or to search bodily cavities. Nor in my view does it include the right to unclothe the person arrested unless the circumstances justify the action, [emphasis added]. (p.284)

In R. v. Fequet (1985), where an accused was locked up "half-naked," the court was of the opinion: "Surely, 'life, liberty and security of the person' [must] include the dignity of the person" (p. 70).

There is, however, authority that in the case of drugs, the court will make an exception and allow strip searches. In R. v. Guberman (1985, p.406) the court held that a strip search was not in violation of section 10 of the Charter (right to counsel). Following the reasoning in R. v. Therens, [1985] the court concluded, by way of analogy, that an accused may have a choice to blow or not to blow into a breathalyzer, but does not have a choice in whether or not he/she will be subjected to a strip search, where drugs are the basis for the search.

School Authorities

Under this heading there appears to be no relevant material in Canadian case law specifically relating to strip searches in the school setting. Consequently, U.S.

jurisprudence may be of value in the analysis of what constitutes an "unreasonable" search in Canadian schools.

United States Jurisprudence

General strip searches are not reasonable. This was clearly established in Bellnier v. Lund (1977). The New York District Court redressed a situation in which the entire fifth grade class was strip searched to recover three dollars. The court was of the opinion:

> In analyzing the search to determine reasonableness, the Court must weigh the danger of the conduct, evidence of which is sought against the students' right of privacy and the need to protect them from the humiliation and psychological harm associated with such a search. (p. 53)

The court followed the decision in People v. D. (1974), which had held that the 4th Amendment applied to students, but to a lesser degree than adults. The court, in Bellnier v. Lund (1977) stated the case involving the search for non-dangerous items as follows:

> The Court is not unmindful of the dilemma which confronts school officials in a situation such as this. However, in view of the relatively slight danger of the conduct involved (as opposed to drug possession, for example), the extent of the search, and the age of the students involved, this Court cannot in good conscience say that the search undertaken was reasonable. (p. 54)

This rationale was applicable where non-dangerous objects are involved, such as a missing ring as in the case of Potts v. Wright (1973). In this case, there was only a threat to conduct a strip search. Threats made by a teacher to students that they would be subjected to a strip search were held not to fall under a teacher's duties, and therefore actionable. The court was of the opinion that:

> A person need not actually undertake an illegal search to be liable for violating another's constitutional rights. It is sufficient that a person act in such a manner as to be either a direct or proximate cause of the constitutional deprivation. (p. 218)

Nude searches represent the highest level of intrusion possible. Zirkel and Glickman (1985) interpreted the balance between a student's right to "privacy" and the school official's right to maintain "discipline" as: "the more intrusive the nature of the search the more justification the administrator should have both for the reason for the search, and the likelihood of the student's guilt" (p. 120).

Reasonableness on behalf of the school administrator is subject to the "special relationship" between the student and the school official. Within the context of schools, Trosch, Williams, and Devore (1982) discussed the relationship between students and school officials and concluded:

> In the school context, students may not realize that they have a constitutional right to object to a search and the Supreme Court has held that mere submission to a show of authority vitiates consent and that coercion is not allowed. (p.46)

When unreasonableness is found on behalf of school officials in the conduct of a strip search that is held to be in violation of constitutional rights such breach will give rise to an action for general damages: (Wood v. Strickland (1975), Picha v. Wieglos (1976)).

Hazard (1975) determined upon the decision in Wood that:

> The test for liability in damages seems to rest on whether student constitutional rights are violated rather than on procedures provided. The equation of a good-faith but misguided act (later found to be in violation of the student's rights) with malice leaves little room for decisional error.
>
> Errors of fact and judgment, or even a misreading of the expulsion's impact on a student's "clearly established constitutional rights" open the doors to expensive litigation and ruinous judgments. (p. 607)

In Doe v. Renfrow (1980), a 13 year old girl was stripped naked after being subjected to a "sniff" search by a male dog. The evidence showed that the alert stance, and the dog's excitement, was caused by the young girl's female dog being in heat. The scent on her clothes had been sniffed by the dog. No drugs were found. The court shared the young woman's outrage in no uncertain terms:

> It does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude. More than that: it is a violation of any known principle of human decency. Apart from any constitutional readings and rulings, simple common sense would indicate that the conduct of the school officials in permitting such a nude search was not only unlawful but outrageous under "settled indisputable principles of law" [Woods v. Strickland] (420 U.S. at 321). (p. 93)

Sorenson (1986) commented on the Doe v. Renfrow (1980) case, and was of the opinion that: "the particular nude searches involved were not reasonable by fourth amendment standards. The court of appeals . . . holding in addition that the school officials involved were not immune from liability for the nude searches" (pp. 30-31).

Fischer and Schimmel (1982) accurately summarized the situation as follows:

> More personal searches require more substantial grounds because they entail greater invasions of privacy . . . "probable cause" is necessary for highly invasive searches, such as a strip search.
>
> Before a student's clothing or body may be searched, courts require more evidence and a higher degree of probability that the particular student is hiding illegal or dangerous materials. Arbitrary searches or mass searches based on general suspicions are frowned upon by the courts as violating the student's privacy. (p. 344 and p. 348)

However, even "strip searches" have been held to be reasonable where drugs are the subject of a search. In Rone v. Davis County Board of Education (1983), a school official asked a 15 year old male student to lower his trousers and his undershorts, in a search for drugs. The court reasoned that the search was valid for the following reasons:

> School authorities need only possess "reasonable suspicion" rather than "probable cause" in order to conduct such a search. The logic behind this standard is that probable cause is necessary only if the evidence in question is to be used in a criminal prosecution.
>
> The matter could have been turned over to the legal authorities for investigation and action. Surely neither Brad nor his mother would have wanted that. Once caught up in the criminal justice system, too many youngsters seem never to escape it. (pp. 30-31)

In this particular case, no drugs were found. One only has to imagine the outcome if drugs had been found, as in the J.M.G. case. The summation of the judge would have been different, and a conviction would, more than likely, have been the result for the student. As it was, the boy was subjected to the highest of personal intrusion, and the judge stated that such action had been in the boy's best interests. It is difficult to find any positive factors for the student, just as it is difficult to find any logic in the judge's decision.

However, in the case of drugs, particularly in the United States, it would appear that the courts allow great latitude for schools official to conduct searches. In People v. Overton (1983),the New York Court of Appeal, even went to the extent of imposing a duty on school officials to conduct strip searches. The court stated: "Dr. Panitz was in charge of the Mount Vernon High School and it was his duty to enforce the rules and regulations which were in existence. As we earlier observed, 'this right becomes a duty when suspicion arises' " (p. 368).

Summary

Search of the person is clearly an invasion against the body of the person, and may be a violation of section 7 "security of the person," and section 8 "unreasonable search and seizure." Since there has not been a decided case in Canada in the school setting, in this area of the law "caution" must be the operative word.

Hunter Dir. of Investigation & Research Combine Branch v. Southam Inc.(1985) failed to address the issue of whether a warrantless search was a "reasonable" limit when applying section 1 to section 8. However, it is reasonably clear that "suspicion alone" and not "probable cause" is the acceptable standard in the school environment.

A strip search involves the most intrusive invasion of privacy. In order to justify such a search, the necessity for the search must be clearly evidenced. Again, in the absence of Canadian jurisprudence, the United States of America case law must be looked upon guardedly. The most prudent basis for the school official to conduct a strip search would be "probable cause," although there is some authority to suggest that even in the case of a strip search the lesser requirement of " reasonable suspicion" may be acceptable by the courts.

Lesser searches of the body and clothing of a student may be deemed to be a "reasonable" limit pursuant to section 1, especially in instances where illicit drugs are involved.

Search & Seizure of Personal Property

The position of the law with respect to search and seizure of personal property seems to be somewhat confused throughout Canada.

A search warrant based on a sworn statement made under oath by a peace officer made on "reasonable and probable grounds" has been the accepted procedure for conducting searches throughout Canada. Protection of the courts also appears to have been extended to writs of assistance, which have been held to be not unlawful pursuant to section 8 of the *Charter*, if made on a "reasonable belief" by the peace officer. Then, the search is "not unreasonable" (*R*. v. *Cameron* (1985)).

In British Columbia, the search of a private dwelling place for illegal drugs, and the subsequent search and seizure of personal property, appears not to be protected by section 8 of the *Charter*. This proposition was established in *R*. v. *Hamill*, [1984] which followed *R*. v. *Collins* (1983), and was subsequently affirmed in *R*. v. *Pasztor* (1984); *R*. v. *Stieben* (1984); and *R*. v. *Descamp* (1984). The cases dealt with section 10 of the *Narcotic Control Act* which allows for writs of assistance. It was held that such searches were not in violation of section 8 of the *Charter*, or if the writs were in violation of s. 8, then the evidence was allowable under section 24 in that the admissibility of such evidence would not bring justice into disrepute.

Following the Alberta Court of Appeal's decision in *R*. v. *Heisler* (1984), and the British Columbia Court of Appeal in *R*. v. *Cameron* (1985), it would appear that section 8 of the *Charter* will not protect the search of personal property on the person or in possession of an individual.

In the *Heisler* case, the police officer searched the purse of the accused prior to her entering a rock concert and drugs were found. The court pointed out:

> Based on the findings of the trial judge we are of the view that the search was clearly illegal . . . We are all of the view that it does not follow that because a search is illegal it must therefore be unreasonable. (p. 477)

In the *Cameron* case, drugs were found by custom inspectors in a parcel to be delivered to a private dwelling. An undercover officer, in a sting operation, delivered the package. A search warrant had been obtained *as if the drugs were already on the premises* and at trial the warrant was held to be invalid. Notwithstanding that the warrant was invalid, the court interpreted the subsequent search and seizure of the drugs in the following manner:

> That [the invalid warrant], by itself, does not necessarily establish that the search was unreasonable and, even if the search was unreasonable within the terms of s. 8, provides no basis for holding that the evidence should be excluded under s. 24. (p. 248)

The Manitoba Court of Queen's Bench in R. v. Zlomanchuck, [1984] appears to take a different approach when it comes to the search of a private dwelling:

> I remain firmly of the view that to permit police entry without a warrant into dwelling houses, except for those exceptional circumstances enumerated in the authorities (to prevent injury or pursuit of suspect criminal), is unwarranted, unreasonable and unconstitutional as contrary to our new Charter. (p. 701)

Searches in the School Setting

In the United States, the law of search and seizure of personal property in the school setting came under extensive review in New Jersey v. T.L.O (1985). In this case a vice-principal demanded to see a 14 year old girl's purse and in the ensuing search, marijuana was found. The Court held that a search may be undertaken by the school official on the basis of "reasonable suspicion" and not "probable cause." Although this case was a "personal property" decision, the court set criteria for searches generally. The test set down by the Supreme Court was extremely complex and has caused much concern for legal scholars.

Splitt (1985) forcibly expressed his concerns:

> Even those of us who receive three years of intense law school training in the methods for deciphering judicial gobbledy gook shudder at this kind of mush. One might be better prepared to tackle the New Jersey v. T.L.O. ruling with a degree in English literature. "Reasonableness is reasonably reasoned reasons, " is a test one expects to find in the writings of Gertrude Stein - not a Supreme Court opinion. (p. 13)

The Court test for "reasonableness" appears to rest on two factors:

1. Was the action justified from its inception?

2. Was the actual search carried out and conducted in the least intrusive manner possible, in light of the age and sex of the student and the nature of the infraction?

The "balancing" philosophy between the state and the individual must be considered in relationship with the larger context of "public order." Justice Powell in the T.L.O. decision succinctly stated the essence of this meaning for students :"In my realistic sense, students within the school environment have a lesser expectation of privacy than members of the population generally" (p. 349).

Justice Stevens in the T.L.O. decision, in a strong dissent, expressed his concerns:

> The schoolroom is the first opportunity most citizens have to experience the power of government. Through it passes every citizen and public official, from school teachers to policemen and prison guards. The values they learn there they take with them in life. One of our most cherished ideals is the one contained in the Fourth Amendment: that the government may not intrude on the personal privacy of its citizens without a warrant or compelling circumstances. The Court's decision today is a curious moral for the Nation's youth. Although the search of T.L.O.'s purse does not trouble today's majority, I submit that we are not dealing with "matters relatively trivial to the welfare of the Nation. There are village tyrants as well as village Hampdens, but none who acts under color of law is beyond reach of the Constitution." (pp. 385-86)

The New Jersey Supreme Court in the State v. Enerud (1983), stated that a locker is a student's "home away from home." In holding that a search of a locker was in violation of constitutional rights under the 4th Amendment, the court recognized that students have certain expectations to the right of privacy but such potential right has to be balanced against the rights of school officials to maintain discipline in the school environment.

In an examination of this issue, the U. S. Federal Court in M.M. v. Anker (1979), stated:

> We recognize, however, that teachers have a unique relationship to their students, both in administering discipline as part of their educational function, and in protecting the well-being of all children in their care and custody. Accordingly, these interests justify great flexibility when applying the Fourth Amendment in a school setting. (p. 589)

It would appear the U.S. courts have acknowledged that students have the right to the expectation of a certain amount of privacy in connection with personal property. Conversely, it is also acknowledged that school officials have a duty to maintain discipline in the school setting. The balance is a delicate one, but upon an examination of the case law, it would appear that a lower standard to privacy when applied to students as opposed to adults under the 4th Amendment. Only in the most outrageous situations will the courts hold a violation of student rights under the United States of America constitution. This appears to be especially true if the nature of the search is for illegal drugs.

In the Canadian context, it appears to be important to ascertain whether a school official is acting in the capacity of an "agent for the state," or merely acting in an "administrative capacity" within the school setting.

The Ontario Court of Appeal in R. v. J.M.G.(1986), held, albeit in around-a-bout way, that in contemporary society a principal acts more as an agent of the state in an administrative capacity by virtue of the fact that the principal is an employee the school board and in such capacity is bound by the Charter. The court stated: "I am prepared to presume that the Charter applies to the relationship between principal and a student, that relationship is not remotely like that of a policeman and citizen [emphasis added]" (p. 710). The Court went on to say:

> I concede that ther may come a time when such consequences are inevitable and the principal becomes an agent of police in detecting crime. But this is not so here; nor was such a position argued. I have read the evidence carefully and there is no sugestion that the principal was doing anything other than performing his duty to maintain proper order and discipline as required by the Education Act. (p. 712)

The difficulty with the position taken by the Court is that it appears to have created a further "double standard" or "role conflict" under the Charter. In other words,the Court held that evidence procured without compliance with the provisions of the Charter was still admissible on the basis that the actions taken by the school official were "eminently reasonable" under statute law. In Ontario, an "agent of the state" appears not the same as "agent for the police."

The Ontario District Court in R. v. L.L.(1986), and the Ontario Court of Appeal in J.M.G.(1986) both decided that even in cases of detention, (in the sense of a criminal "arrest" and "detention" contemplated by section 10 of the Charter), the legal consequences have no application in the school setting if the actions of the school officials were characterized as administrative, and not criminal, from the onset of the investigation.

Summary

In conclusion, therefore, it would appear that although warrantless or writless searches of personal property are prima facie illegal and invalid, subject to an exception in the case of the search for drugs where searches are deemed "reasonable" and not a violation of section 8 of the Charter. However, even where the courts have held that a search was unreasonable under section 8 (as in the Heisler decision) the search has been held to be "reasonable" pursuant to section 1 of the Charter.

The search for drugs on real property, or on the person of an individual found on real property, appear to be subject to an even more liberal construction. Section 24(2) has been used repeatedly to admit evidence into court proceedings on the basis that admission would not "bring the administration of justice into disrepute." This line of judicial reasoning is embodied in the Cameron line of cases emanating from British Columbia, and the Heisler decision in Alberta. It would appear that section 8 is "toothless" when drugs are the basis for a search.

In the U,S.,this position would appear to be especially true within a school setting, where drugs are the basic issue. This position is stated in the U.S. Supreme Court decision in T.L.O., and overwhelmingly, supported by other U.S. cases.

CHAPTER 4

INTERROGATION AND THE ADMISSIBILITY OF CULPABLE STATEMENTS

In this chapter the matter of interrogation and the admissibility of culpable statements by school officials from the students under their control is examined. The rules relating to interrogation and the admissibility of culpable statements in schools are found in the common law of the United Kingdom and Canada, and are codified in section 56 of the YOA. Before entering into an analysis of each of the subsections and their interrelatedness, it was necessary to consider the background of the YOA in relationship to the former JDA. Examination of the differences in the Acts, and the reasons for changes in societal values were, therefore, a necessary prerequisite to any meaningful analysis.

Section 56 deals with the procedures that have to followed in order that the rights of young persons, relative to the acquisition of culpable statements made by students to school officials during interrogation, are legally upheld. This analysis considered each subsection in the light of relevant court decisions. Appropriate literature was reviewed, and the role of the school officials was reevaluated as a direct result of the YOA.

Introduction

With the proclamation of the Young Offenders Act in 1985, the federal government attempted to change societal attitudes towards young offenders within contemporary society. The intentions of the Act clearly emphasized that young persons should no longer be treated as juveniles "in need of correction" as they were under the Juvenile Delinquents Act, (1909), but rather young individuals possessing rights and obligations in their own right. Within this context, the analysis examined specifically section 56 of the YOA.

Philosophy of the Young Offenders Act.

Prior to the enactment of the Young Offenders Act, 1985, young offenders were subject to the provisions of the Juvenile Delinquents Act, 1909. And, prior to the enactment of the JDA, for the most part, children were considered as chattels of their parents. With the enactment of the JDA came subtle changes. As MacKay (1986) put it:

> At common law children are not recognized as autonomous people with individual rights. Instead they were regarded originally as property of their parents and later as dependent creatures in need of protection from both their parents and the state. (p. 11)

Consequently, children had little or no responsibility to society as a whole. Justice was handed out on a piecemeal basis and ranged from a "slap on the wrist" to harsh treatment in adult court.

The Legal Education Society of Alberta (1984) summed up the situation succinctly:

> Throughout the Canadian juvenile justice system, there was evidence of uncertainty and the lack of uniformity. Disparity in charging, diversion, conviction and sentencing resources was present in the twelve different systems operated by the ten provinces and the two territories. Further, regional and even municipal divergence suggested that justice for the young offenders had, in many instances, varied with the length of the judge's foot or the social worker's pencil. (p. 24)

Moyer (1980), in a review of the literature, pointed out another reason why the JDA did not work: "it labels and stigmatizes youth with whom it deals" (p. viii). He was of the following opinion:

> The failure of the court to provide individualized treatment, the theoretical shortcomings of the original ideals of the court, the necessity for the community to assume responsibility for delinquency, concerns for the status of fender, [sic.] and the stigmatization of the juvenile by the system have all been given as reasons for putting forward the diversion alternative. (p. viii)

In diverting the child from Adult Court to the Juvenile Court, Moyer (1980) felt that all children that fell afoul of the law were treated the same, that of being a "delinquent." In arguing for "intervention" as opposed to "diversion," Moyer (1980) stated: "Mediation, crisis intervention, restitution, family counselling, and individual casework are among the modes of intervention." Intervention meant the prevention of the stigmatization of being a "delinquent" (p. xii).

Moyer (1980) went on to point out the difference between "prevention" and "diversion": "In prevention, the child *might commit* an act which might initiate justice system proceedings; in diversion, the child *has already committed* an offence and is in direct danger of a court appearance" [emphasis added] (p. ix).

From the esoteric to the practical was Wilson's (1982) assessment of the reasons for the enactment of the Juvenile court system:

> The juvenile court movement was but part of a social movement to clear slum tenements, to enact and enforce humane factory laws, to ameliorate prison conditions and save future generations from misery, pauperism and crime.
>
> Consequently, through the notion of *parens patriae* the concept of juvenile courts designed to protect socially and economically disadvantaged young people was developed at the turn of the century. (p. 3)

Whatever the real reasons behind the enactment of the JDA, the government of Canada brought about its demise when the YOA received Royal Assent on July 7, 1982.

One of the most profound statements enunciated for the change in societal attitudes towards children within society, was made by Reitman (1979) in a powerful article on reasons for the abolition of corporal punishment in U.S. schools:

> Acceptance of this civil liberties position hinges on acceptance of changes in the status of children in society. The point has long passed where children are subject to the control of their parents, a relic of a smaller, less complex society in which government played a less influencial role. Children are now controlled by various institutions of the state, for example, schools, social

> agencies, and courts; and we have begun to think of applying to children the same rights which adults possess when they become involved with agencies of state. (p. 196)

The YOA received Royal Assent July 7, 1982, but, due to much societal wrangling, was not proclaimed until April 1, 1984. It was, perhaps, a premonition that the YOA came into law on "April Fool's Day" as the Act has been the subject of much heated debate for many years before, during, and after its proclamation. The "age" clause was mandated April 1, 1985, and fundamental revision were incorporated on November 1, 1986. Transfer of authority over the Act from the Solicitor General to the Department of Justice occurred on April 1, 1987.

Awareness that children were "persons" and, therefore, should be treated as such under the law, was the basis for societal change. The Honourable Robert Kaplan summarized the philosophy that lay behind the YOA as follows:

> The Act balances the rights of society, the responsibility that the young offenders must bear for their actions and the special needs and rights of our young people. In doing so, it is in keeping with philosophy and circumstances of our time. Young offenders are no longer regarded as merely misguided or "sick" and of need of treatment as they were in the past. Instead they are to be held more accountable for their illegal behaviour. However, the new Act recognizes that they should not be held as accountable in law as a adult offender because they are less mature and more dependent on others. (p. 25)

The new legislation was evidence of this philosophical shift, but as MacKay (1984) pointed out, both the old and the new acts had at least one common denominator; under both systems the end result was the same, that is, the lack of a criminal record. As MacKay (1984) stated:

> There are some characteristics common to both the Young Offenders Act and its predecessor. A young person who commits a crime under the Criminal Code is tried for that offence, but if found guilty is deemed to have committed a breach of the applicable statute - the Juvenile Delinquents Act or the Young Offenders Act. Regardless of whether a juvenile committed the minor offence of truancy or the major one of murder, he or she would only be charged with a delinquency. This approach ensures that the young person does not acquire a criminal record. (p. 223)

The shift from a "non-legal entity" to "societal responsibility," however, cannot be absolute. There has to be an element of reduced accountability, as children are not and should not be treated as adults. They should not, generally speaking: "be held accountable in the same manner or suffer the same consequences for their behaviour as adults" (L.E.S.A., 1984, p. 2).

This lesser degree of accountability appears also to have certain special guarantees relating to the processes involved when dealing with young offenders.

Section 3 of the YOA, and specifically subsection 1(e) ties in the changes in philosophies by direct reference to the Charter:

> 1(e) young persons have rights and freedoms in the own right, including those stated in the Canadian Charter of Rights and Freedoms or in the Canadian Bill of Rights, and in particular a right to be heard in the course of and to participate in, the processes that lead to decisions that affect them, and young persons should have special guarantees of their rights and freedoms

The change in philosophies can best be examined in light of the court decisions that have adjudicated young offenders' rights under the Charter and section 56 of the YOA.

Since the introduction of the Charter and the YOA judicial decisions have resulted in a complex pattern of reasonings. Diverse court decisions are illustrative of the difficulties associated with compromises the courts have had to make between the two competing philosophies.

Adjudications have shown that the conflict between the two philosophies emanating from the JDA and the YOA has resulted in intertwined, complex, vague and sometimes illusive legal issues. The situation has been made more complex because of the divergent reasoning of judges, legal and education scholars alike.

Within the backdrop of this apparent conflict of societal norms and values, section 56 of the YOA represented many of the components that mandated the intended shift in philosophies. Consequently, this analysis, has proceeded, as far as possible, to examine the legal requirements under each subsection of section 56 of the YOA. This analysis should not be regarded as exhaustive, but rather illustrative of the problems that the courts have encountered.

Statutory Components

Section 56 of the YOA reads as follows:

1. Subject to this section, the law relating to the admissibility of statements made by persons accused of committing offences applies in respect to young persons.

2. No oral or written statement given by a young person to a peace officer or other person who is,in law, a person in authority is admissible against the young person unless

(a) the statement was voluntary;

(b) the person to whom the statement was given has, before the statement was made, clearly explained to the young person, in language appropriate to his age and understanding, that

(i) the young person is under no obligation to give a statement,

(ii) any statement given by him may be used as evidence in proceedings against him,

(iii) the young person has the right to consult another person in accordance with paragraph (c), and

(iv) any statement made by the young person is required to be made in the presence of the person consulted, unless the young person desires otherwise;

(c) the young person has, before the statement was made, been given a reasonable opportunity to consult with counsel or a parent, or in the absence of a parent, an adult relative, or in the absence of parent or an adult relative, any other appropriate adult chosen by the young person, and

(d) where the young person consults with any person pursuant to paragraph (c), the young person has been given a reasonable opportunity to make the statement in the presence of that person.

(3) The requirements set out in paragraph (2)(b),(c) and (d) do not apply in respect of oral

> statements where they are made spontaneously by the young person to a peace officer or other person in authority before that person has had a reasonable opportunity to comply with those requirements.
>
> (4) A young person may waive his rights under paragraph (2)(c) or (d) but any such waiver shall be made in writing and shall contain a statement signed by the young person that he has been apprised of the right that he is waiving.
>
> (5) A youth court judge may rule inadmissible in any proceedings under this Act a statement given by the young person in respect of whom the proceedings are taken if the young person satisfies the judge that the statement was given under duress imposed by any person who is not, in law, a person in authority.
>
> (6) For the purpose of this section, an adult consulted pursuant to paragraph 56(2)(c) shall, in the absence of evidence to the contrary, be deemed not to be a person in authority. [1980-81-82-83,c.110, s.56; R.S.C.1985, c. 24(2nd Supp), s.38.]

Basis for Interpretation

Criminal Justice System

Before proceeding with an examination of the concepts embodied in each of the subsections, it is essential to understand the nature of the criminal justice system in Canada. More specifically, it is crucial to understand the attitudes of the judicial system towards children.

Every person in Canada when charged with a criminal offence is presumed to be innocent until proven guilty. The onus is on the Crown to prove, beyond a reasonable doubt, that the accused is guilty of the offence alleged. Each of the words that makes up the charge under the Criminal Code of Canada, and the YOA must be proved on the basis of both fact and law specifically relevant to the wording of each offence.

The doctrine that a "person is innocent until proven guilty" is the basis upon which the court must proceed. The system is not perfect but it is within this imperfect framework that section 56 of the YOA must be evaluated.

Criteria to be Applied

Liberally Construed

The Supreme Court of Canada in R. v. Oakes (1986), stated that the Charter should be generously interpreted in favour of Canadian citizens. As a result of this edict, countless other lower court decisions throughout Canada have embodied this basic principle when interpreting the YOA.

Two recent decisions of the Nova Scotia Court of Appeal are indicative of the approach generally taken by youth courts in most provinces. In R. v. R.W.E.(1986), the sentiment that the YOA should be liberally construed in favour of a young offender was deeply entrenched in the reasons for judgement. Likewise, in R. v. C.J.M. (1986), the court succinctly stated: "Section 3(1) of the Young Offenders Act provides the principles which are to be applied in sentencing young offenders. The Act is to be liberally construed in applying these principles" (p. 394).

High Standard of Care

In R. v. P.B. (1984), the British Columbia Provincial Court (the provincial court being the level of court jurisdiction throughout Canada in which the large majority of decisions affecting young offenders are made) was of the opinion that:

> As to the requirements of s. 56(2)(b), in my opinion the word "clearly" specifies a mandatory requirement which requires a high standard of performance on the part of an investigating police officer. At the very minimum, for a sophisticated youth, it seems to me that the exact words of s. 56(2)(b) must be used. For youths of lesser competence the section implies that similar precision is required, the only allowance being more common language. (pp. 27-28)

Special Care

R. v. *Jacques* (1958), decided more than two decades before the implementation of the *Charter* and the *YOA*, clearly supported the need for special care in the reading of rights to young persons. The court stated:

> Indeed, if the jurisprudence concerning the taking of a statement shows clearly at what point the rights of the individual should be protected, these rights should be observed even more carefully in the case of a child by reason of the fact that a child is a child and as such, he has not the resistance, maturity, or understanding of an adult to cope with a situation of this nature. (p. 267)

Application of the Common Law

The common law is the basis for the interpretation of the YOA. Codification of this is found in section 56(1). Section 56(1) states:

> Subject to this section, the law relating to the admissibility of statements made by persons accused of committing offences applies in respect of young offenders.

Components of the Common Law Relating to the Admissibility of Statements

The drafters of the YOA, in addition to the special rights contained within the Act, obviously did not intend such new rights to be a substitute for those rights under the common law that had protected adults over countless years. The admissibility of statements under the common law have been the subject of great scrutiny by the courts.

The following is an examination of the components of the law affecting the admissibility of statements in the area of criminal law relating to adults.

Self Incrimination

It is a fundamental rule of law in the criminal justice system that a person charged with an offence need not testify in his own defence. Indeed, such a person need not say anything to anyone at any stage in the criminal proceedings. The right to remain silent is important, as logically if such a right is alleged to have been waived, such a situation would lead to the obvious question: Why would a person make an incriminating statement which facilitated or made it easier for the Crown to prove the alleged charge?

The common law therefore assumes that statements made by an accused, which the Crown seeks to have admitted, were procured under duress, and against the person's will. This assumption dates back to antiquity.

The reasons were clearly articulated in the hallmark decision of the Privy Council in Ibrahim v. The King, [1914]. The court was of the following opinion:

> It has long been established as a positive rule of English criminal law, that no statement of an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. (p. 609)

Section 56(2)(a) of the YOA codified this basic common law principle :

> i. No oral or written statement given by a young person to a peace officer or other person who is, in law, a person in authority is admissible against the young person unless
>
> ii. the statement was voluntary

The Statement must be Voluntary

The principle that the statement must be voluntary, and the underpinning rationale enunciated in Ibrahim v. The King, [1914] that there should be "no fear of prejudice" or "hope of advantage" was applied by the Supreme Court of Canada in Boudreau v. The King, [1949], and R. v. Fitton, [1956].

In both cases it was held that another requirement of the test for admissibility was that the statement must have been made to a "person in authority." The test is irrelevant if the statement had been made to a person **not** in authority .

In other words, the question of voluntariness is not an issue if the statement was made to a person not involved in the judicial process. MacKay (1984) made this situation clear: "If the statement is made to any other person it will be considered voluntary without exploring whether there was hope of advantage or fear of prejudice" (p. 216).

The underlying assumption of duress in the admissibility of statements, and the included concept of voluntariness, can also be viewed from a different vantage point. According to Bala and Lilles (1984) what the court wants to ensure is the truthfulness of the statement. The authors elaborated on this "other-side-of-the-coin" view of voluntariness as follows:

> In Canada, the ascertainment of truth, forms the basis for the admissibility of statements. A voluntary confession is admissible because if voluntary, common sense dictates that it is likely to be true. A confession which is induced by some promise or threat is involuntary, and may be untrue, and therefore is excluded from evidence. Hence, the reliability or truthfulness of the statement is the primary concern when excluding involuntary statements. (p. 367)

Rekai and Maubach (1986, p.4) are quick to point out that section 56(5) has provided an additional safeguard for the young person. The question of duress by any person, whether in authority or not, is reviewable by a judge.

Section 56(5) states:

> A youth court judge may rule inadmissible in any proceedings under this Act a statement given by the young person in respect of whom the proceedings are taken if the young person satisfies the judge that the statement was given under duress imposed by any person who is not, in law, a person in authority.

Harris (1990) commented that, in addition to common law rules of "fear of prejudice or hope of advantage" that applied to the test of "voluntariness," section 56(5) created two new categories:

(1) capacity of the accused, and

(2) atmosphere of coercion or oppression.

These new categories involve the state of mind of the young person, and the circumstances in which the statement was taken. Harris (1990) further points out that in the case of a young offender the rules, both old and new: "are applied with greater stringency and care when the statement before the court is one made by a youthful accused" (pp. 56.2 & 56.3).

Person in Authority

The complexity of the rule on the admissibility of culpable statements is made even more complex by the intricacies of each of the sub-components in relationship with each other. This is clearly evident when an analysis of the term "person in authority" is made.

Following the corner-stone decisions of the Privy Council in Ibrahim v. The King, [1914], the Supreme Court of Canada in Boudreau v. The King, [1949] and R. v. Fitton (1956) all dealt with statements made to police authorities. Even in cases where police personnel act subversively as in R. v. Rothman (1981), there appears to be little doubt that the courts will admit statements made to police officials if the test of admissibility has been met. In R. v. Rothman (1981), the Supreme Court of Canada held that the conceptualization of the term "person in authority" was a subjective one. Kaufman (1979) capsulated the concept in the form of a question: "Did the accused truly believe at the time he made the declaration that the person he dealt with had some degree of power over him?" (p. 81).

In R. v. Pronessa and Paquette (1982), the court postulated that a "person in authority" was someone who is engaged in the arrest, detention, examination, or prosecution of the accused. The court in R. v. Manninen (1983), interpreted "examination" to mean interrogation.

In the context of the school setting, the courts have appeared to be inconsistent. In R. v. McLintock (1962), a headmistress was held to be a "person in authority", but a fellow student was not, even in the case of direct transfer of authority. In R. v. Harrinanan (1977), a social worker was held to be a "person in authority", but in R. v. A.B. (1986), a psychiatrist was not.

In R. v. S.L.(1984), the court proceeded on the assumption that a school principal, and a guidance counsellor (the latter, qua teacher) were persons in authority. Dickinson and MacKay (1989) were of the opinion that the rationale in the J.M.G. case also supported the proposition that a principal is a "person in authority." The authors stated:

> In the J.M.G. decision, however, the Ontario Court of Appeal clearly supported the idea that principals' disciplinary authority is statute based. This analysis would seem to make it easier to rationalize holding them to be "persons in authority" for the purpose of determining the admissibility of students' confessions. (p. 397)

Tinsley and Manley-Casimir (1987), leave no doubt as to where they stand on the issue: "All these considerations lead inescapably to the conclusion that a teacher is subject to the rules of section 56 of the YOA . . . Relevant legal cases have established teachers as "persons in authority" (p. 4).

In terms of the family setting, (Queen v. Midkiff (1980)), a decision of the Ontario High Court, held that a parent was normally a "person in authority", but left the question in a state of limbo. The court stated that, in some cases, a person may not be a "person in authority." In R. v. A.B. (1986), the Ontario Court of Appeal appeared to hold that statements made to parents before police intervention were admissible. The court was of the opinion:

> The family discussions leading to the identification of problems and the provision of assistance without judicial intervention are encouraged by the Act [YOA]. Only the most serious continued and flagrant misconduct could ever be expected to lead parents to call authorities about their own child. Until that time, parents would not, in law, be persons in authority. (p. 76)

As can be readily seen, the courts have encountered difficulties in defining exactly what is meant by a "person in authority." Further complications that have arisen are discussed in the next section.

The Right to Consult with an "Appropriate Person"

Section 56(2)(b)(iii) states:

> The young person has the right to consult with legal counsel, a parent, a relative, or an "appropriate adult"

MacKay (1984) reasoned that it: "is likely that a teacher would be considered an appropriate adult for a young person to consult while being questioned" (p. 216).

As a probable consequence of the difficulties encountered by the courts in defining the concept of a "person in authority" in conjunction with the right of a young person to consult with an "appropriate adult" pursuant to section 56(2)(c), an amendment was made to the YOA in 1986.

The amendment stated:

> Section 56 of the said Act is amended by adding thereto the following subsection:
>
> ii. For the purpose of this section, an adult consulted pursuant to paragraph 56 (2)(c) shall, in the absence of evidence to the contrary, be deemed not to be a person in authority.

The crucial question that still remains to be answered is: Who determines who is an "appropriate adult?" Is it the prerogative of the students? May it be at the discretion of the principal or a teacher? Because the child is a minor under the law, does the onus rest with the parents? MaKay and Sutherland (1992) identified a rather curious and problematic factor that a teacher, when placed in such a position, must resolve:

> If she [student] decides to consult a teacher, then the teacher is not required to inform the student of her rights under section 56 and any statement given to the teacher by the student may be used latter in criminal proceedings. However, if the teacher or principal is questioning [emphasis added] the student then section 56 protections apply and the student must be appraised of her rights before any of the evidence will be admissible. (p. 78)

This delicate problem may place a teacher in an untenable position both legally, as well as morally.

Presence of the Person Consulted

Section 56(2)(b)(iv) states:

> any statement to be made must be made in the presence of the person consulted unless the young person desires otherwise

These subsections clearly indicate that the right to consult with an "appropriate adult" is conjunctive with the requirement that any statement contemplated by the young person must be made in the presence of the chosen "appropriate adult."

Further, section 56 (2)(d) states:

> where the young person consults any person pursuant to paragraph(c), the young person has been given a reasonable opportunity to make the statement in the presence of that person

The requirement of "reasonable opportunity" was discussed more fully under the heading "guidelines for the taking of statements."

The Right to Consult with Legal Counsel

Fundamental to the legal system is the right to consult with legal counsel before the making of any culpable statement. This right is deeply entrenched both in the YOA sections, aforementioned, and also in sections 10 and 11 of the Charter and is also a fundamental right of an accused under the common law.

Section 56(5) is a codification of such a right, and as such, has been strictly adhered to by the courts in juvenile matters. The right is an absolute one.

Cromwell (1984) clearly stated this proposition:

> Under the Young Offenders Act, it might be argued that the extensive right to counsel is designed to prevent a young person from prejudicing himself without the opportunity of obtaining legal advice and that evidence obtained in breach of that right ought to be excluded. (p. 13)

Before the enactment of the YOA, the Supreme Court of Canada in Brownridge v. R. [1972], clearly stated that the right to counsel is an immediate right, and although such right was deemed also to accrue to a "guardian" or "next friend," because the young offender was not of legal age (R. v. W.W.W. (1985)), it is now clear that the right to counsel is a personal right of the young person. This premise was adopted by the Legal Education Society of Alberta (1984, pp. 2.1.01, and 5.12 (1)).

In the case of a young, unsophisticated and uneducated accused (R. v. Nelson (1982, Man. C. A.), the right to counsel must be clearly explained to the young person (R. v. G.P.S. (1985, N.S.Co.Ct., p.63).

Even a reasonable or understandable delay (as in the case of an appointment made by the authorities for a Legal Aid Certificate), will render a statement inadmissible. In R. v. S.G. (1984), the court emphasized this requirement:

> In my view the length of time apparently required by L A S A to determine whether the young person is unable to obtain counsel through the legal aid program, has the effect of denying the right given to the young person in s.11(1) to retain and instruct counsel without delay. (p. 350)

In R. v. B.M. (1985), the police continued to question a young person after a lawyer had advised the minor to say nothing. The statement was held to be void, and, consequently, inadmissible.

Waiver of Rights

Section 56(4) provides that a young person may waive the rights contained within section 56. The waiver must be in writing subject to subsections (2)(c), and (d). The waiver must also contain a statement to the effect that the young person has been apprised of his or her rights (Bala and Lilles,1984, p. 373). Further, the waiver is only effective if the young person is represented by legal counsel (Legal Education Society,1988, p. 2.1.01). In R. v. B.C.W. (1986), the court held that the young person must fully comprehend what is being waived.

Bala and Lilles (1984) summed up the legal status of the waiver as follows:

> It should be noted that the obligation to caution the young person pursuant to para. 56(2)(b) cannot be waived; moreover, a waiver does not affect the requirement that the statement be voluntary (para. 56(2)(a)), or otherwise admissible according to general law relating to the admissibility of statements (s - s. 56(1)). (p. 383)

Spontaneous Statements

The only apparent exception to the legal requirements contained in section 56, are verbal statements made shortly after the commission of a crime by reason that such statements were part of the *res gestae*, that is, associated with, or flowing from, the crime itself.

The acceptance of spontaneous statements into evidence is based upon an exception to the Hearsay Rule, which is referred to as *res gestae* statements. Confessions do not fall under the *res gestae* rule (*R.* v. *McMahon* (1889), Ont. C.A.). The admissibility of a spontaneous statement is based upon the notion that such a statement must be made contemporaneous with the commission of the crime, accident or event. That is to say, the spontaneous statement must be made either during, or immediately before or after its occurrence, but not at such an interval from the occurrence as to allow for the fabrication of evidence (*Klippenstein* v. *R.* (1981), Alta. C.A.).

The Manitoba Court of Appeal, in Regina v. H. (1986), held that verbal statements made several days after a commission of a crime were not admissible. The court stated:

> Had he blurted out a confession when first spoken to, there is little doubt that it would be admissible. But the incriminating statement here in question was taken at a point in time when he was a suspect, was under arrest and was undergoing interrogation. (p. 118)

Legal Guidelines for the Taking of Statements

Clear Explanation

Statutory Requirements

Section 56(2)(b) of the YOA, as the prerequisite to all of the subsequent subsections, states that: "the person to whom the statement was given has, before the statement was made, clearly explained to the young person, in language appropriate to his age and understanding." That is, a clear explanation of the charges and the subsequent consequences attached to, and flowing from, the alleged charges. The operative words are "clearly explained" and "in language appropriate to his age and understanding."

As a necessary condition to an understanding of how these words might be interpreted under the YOA, it is perhaps useful to examine how the courts have handled the taking of statements under the JDA.

Case Law

In R. v. Jacques (1958, p. 268), the judge laid down guidelines which authorities should follow:

> 1. Require that a relative, preferably of the same sex as the child to be questioned, should accompany the child to be questioned to the place of interrogation;
>
> 2. Give the child, at the place or room of the interrogation, in the presence of the relative who accompanies him, the choice of deciding whether he wishes his relative to stay in the same room during the questioning or not;
>
> 3. Carry out the questioning as soon as the child and his relative arrive at headquarters;
>
> 4. Ask the child, as soon as the caution is given, whether he understands it and if not, give him an explanation;
>
> 5. Detain the child, if there is a possibility of proceeding according to 3, above, in a place designated by the competent authorities as a place for the detention of children.

Expanded Guidelines

These guidelines were incorporated, word-for-word, into the decision of the Alberta Supreme Court in Re A, [1975]. To item #4 the court added: "which he understands and which points out to the child the consequences that may flow from making the statement" (pp. 369-370).

A number #6 was also added:

> 6. Explain to the child over the age of 14 years that, while the only charge that can be laid against him is that of being a juvenile delinquent, there is a chance that the juvenile court judge may send him to trial in the higher court, and that he may there be charged with an offence as an adult,

> and that offence should be explained to him. (pp.369-370)

Special Considerations

The Ontario Supreme Court accepted the guidelines of the R. v. Jacques (1958) decision, in the R. v. Yensen (1961) case, and added a further caution in the circumstances of the interrogation of a retarded child: "I think the mere reading of this caution was quite an empty performance, especially in the light of the evidence that we have received as to the mental capacity of the accused" (p. 344).

Greater care in the explaining the rights specified in the YOA was also emphasized in R. v. Kelly Sharpe (1982), and the British Columbia Court of Appeal in R. v. M.A.M. (1986), stated that the onus for proving the clarity of the explanations lay clearly on the Crown. The court further concluded that there must be a "genuine attempt" by the police to explain the provisions of section 56.

Summary

This chapter has examined the provisions of section 56 of the YOA in light of existing case law. Each subsection was examined in relation to each of the other subsections; the concepts of self-incrimination, voluntariness of statements, person in authority, appropriate adult, right to consult with counsel, waiver of rights and spontaneous statements were examined.

CHAPTER 5

ANALYSIS OF SCHOOL BOARD POLICIES

Introduction

In October, 1991, one hundred and three (103) letters were mailed out to Offices of Superintendents throughout Canada. In an attempt to obtain a "balance" between large, medium and small school jurisdictions within the sampling, two large and two medium school jurisdictions were specifically chosen in each of the ten provinces and the federal territories. A maximum of six (6) jurisdictions from each the list of the eleven (11) school jurisdictions was then chosen. There are no school boards in the Yukon territories.

Table 1 is a breakdown, according to jurisdiction, the number of school boards that responded and the number of policies in the replies. Out of 103 letters sent to the offices of superintendents across Canada,there were sixty eight (68) responses which contained twenty nine (29) policies.

It is interesting to note that several of the respondents without policies either wished they had policies in place, or pleaded procrastination. Many requested assistance in this area, and several asked for a copy of a model policy.

Table 1: School Boards Responding to Letter

Jurisdiction	Sent	Replies	No of policies in replies
Alta.	9	9	7
B. C.	10	6	1
Man.	10	6	2
N. B.	10	8	4
Nfld.	10	9	3
N. W. T.	9	5	3
N. S.	10	5	1
Ont.	10	8	3
P. E. I.	5	5	2
Que.	10	1	1
Sask.	10	6	2
Totals	103	68	29

In accordance with the methodological procedure outlined in Chapter 1, Step #1 was undertaken at this juncture. In the first PART of this analysis an examination of the data on the issues of interrogation, and the admissibility of culpable statements was undertaken.

In order to establish criteria against which the policy statements are to be compared, this stage of the thesis was concerned with an examination of the common law in criminal matters relating to interrogation, and the admissibility of culpable statements. In addition, an examination was made of the court cases directly related to the YOA. Upon completion of the analysis, a set of factors was identified and specific items were selected to form the criteria to be applied.

PART ONE

Analysis of the Survey Relating to the Issues of Interrogation, and the Admissibility of Culpable Statements

Introduction

The first part of the analysis was concerned with relating the policies to the issues of interrogation, and the admissibility of culpable statements. The analysis of the policy statements relating to search and seizure was undertaken in PART TWO of this study.

Step #1: Examination of the Common Law Relating to Interrogation, and the Admissibility of Culpable Statements

Criminal Law

An examination of the common law on the issues of interrogation and the admissibility of culpable statements was undertaken in order to establish a set of elements held by the courts to be required for the lawful execution of the above mentioned issues within criminal law.

The following elements were identified:

1. Self incrimination: the right of an accused to remain silent;
2. The statement must be voluntary;
3. The statement must have been made to a "person in authority";
4. The accused must be allowed to consult legal counsel;
5. There must be clear explanation of the charges;
6. The accused must be told of the consequences that flow from the making of a statement.

Young Offenders Acts

A further examination was made of those elements that must be present in the common law specifically related to section 56 of the YOA.

The following elements were identified, in addition to the above items:

7. That the young person must be taken to a "quiet" private room for interrogation;

8. The parent, or an "appropriate person" must be present when the statement is made;

9. Any "waiver" of rights must be in writing;

10. A clear explanation of the charges, or the reason for the interrogation, must be made to the young person in language that is tailored to his or her age and understanding;

11. In the case of indictable offences, it must be clearly explained to a child over the age of 14 that there is a possibility that he or she may be transferred to adult court;

12. In the case of a retarded child, extra special care must be taken in all communications;

13. Specific mention must be made of the YOA, and especially the rights under section 56;

14. Explanation that any spontaneous statements made are not subject to the laws relating to admissibility.

Since the prime consideration was to identify those elements that should be included in a school policy, and since some of the elements mentioned above are a mixture of facts and questions of law, modifications have been made in the establishment of the criteria to be used in this analysis.

For example, the question as to voluntariness of a statement is a question of fact. Was physical force, or the threat of the use of physical force, used in order to extract the statement? Alternatively, were favourable promises made?

In the school setting, voluntariness may be regarded as the flip side of the right to remain silent. And, since it is highly unlikely that force or promises would be used by school officials, voluntariness has been included in the category of "the right to remain silent." In fact, an examination of the school policies revealed that the wording used, in most cases, was implicitly included the issue of voluntariness of a statement. In other words, school officials are not lawyers, and if the intent appeared to be implicitly included in other wordings, then certain elements were included and amalgamated into certain categories.

In addition, therefore, the issues of "person in authority" and the effects of a "spontaneous statements" have been eliminated from the criteria to be utilized. Also, the requirement that the student should be "taken to a quiet room" has been omitted as it seemed that all important matters are always conducted in the principal's office. If this assumption is incorrect then the error is in the favour of the school official.

Criteria

The following are the elements against which the school policy statements will be compared:

Item #1: The student must be told that he, or she, has right to remain silent;

Item #2: A parent,or an "appropriate person" chosen by the student, must be contacted and allowed to talk to the student before any statements are made;

Item #3: Any statements made must be made in the presence of a parent or an "appropriate person";

Item #4: A student must be told of the right to legal counsel;

Item #5: Any "waiver" of rights must be in writing;

Item #6: There must be clear explanations of the charges, or the reasons for the interrogation, in language suited to the age and understanding of the student;

Item #7: The legal consequences flowing from the making of an culpable statements, must be clearly stated in language suited to the age, and competence of the student;

Item #8: If a student is over the age of 14 year of age, and especially in the case of a serious offence (indictable), then the student must be told that he, or she, may be transferred to adult court;

Item #9: Special care, and attention, must be taken in all communications made to a retarded student. The courts have ruled that "going through the motions" is legally unacceptable;

Item #10: Specific mention must be made of the application of the YOA to the school setting, and especially to the legal rights of the student under section 56.

Step #2: Assessment of the Contents of the School Policies in Relation to the Requirements of the Law

A count was made of the number of times the ten (10) criteria appeared in the 29 school policies. Each policy was appraised, and credit was given even in instances where, imprecise wording did not meet the legal requirements. In other words, if the basic intent was present somewhere within the document, then credit was given even when a school policy simply contained extracts from the YOA. Such a "bare" policy statement has been handled as if there had been a comprehensive directive to school officials.

Table 2 provides the frequency count according to jurisdiction of the province or territory.

Saskatchewan, in an examination of the two (2) policies scored considerably higher than the large majority of the other jurisdictions with a count of thirteen (13) out of a possible score of (20) twenty.

Prince Edward Island with a response rate of 5 policies in the 5 replies had 2 policies in place and scored ten (10) out of a possible twenty (20),while Quebec which responded only once out of ten (10), had the same count.

It is difficult to draw any conclusive generalizations that could be applied the larger educational environment. Again, caution is the operative word.

New Brunswick, was the worst offender with only three (3) of the required criteria in the forty (40) required factors contained in four (4) policies. The balance of the jurisdictions ranged between twenty (20) and Forty (40) percentage compliance level.

Table 2: Policy/Elements: Frequency in Each Province and Territory

Jurisdiction	Policies	Maximum 'elements' No. possible	No of 'elements' identified
Alta.	7	70	24
B. C.	1	10	2
Man.	2	20	8
N. B.	4	40	3
Nfld.	3	30	10
N. W. T.	3	30	12
N. S.	1	10	2
Ont.	3	30	10
P. E. I.	2	20	10
Que.	1	10	6
Sask.	2	20	13
Totals	29	290	100

Step #3: A Comparative Analysis of the "Content Analysis" and the Criteria"

When one is confronted with sparse data, the task becomes even more difficult. Although one may acquire a "flavour" for a discernable trend, in actuality it is extremely dangerous to arrive at conclusions based upon small samples. This was the case with the data under review.

With this in mind, the next section proceeded with the third step of the evaluation. Comments were made on the other data whenever appropriate.

Table #3 is a breakdown of items one (1) through ten (10) of the elements that had been identified in the criminal common law and court cases that dealt specifically with the JDA and YOA.

The overall average for the compliance level in the survey was one hundred (100) out a possible raw score of two hundred and ninety (290) for a compliance level of thirty four point eight (34.8%). Alberta was slightly below this average, and had a frequency count of twenty two (22) out of a possible score of seventy (70) for a thirty four point three percentage points (34.3%) compliance level.

Table 3: Frequency of each 'Element' in each Province and Territory

Item #		1	#2	#3	#4	#5	#6	#7	#8	#9	#10
	No. policies										
Alta.	7	3	7	5	4	2	0	2	0	0	1
B. C.	1	1	1	0	0	0	0	0	0	0	0
Man.	2	1	2	1	1	1	0	1	0	0	1
N. B.	4	0	3	0	0	0	0	0	0	0	0
Nfld.	3	2	2	1	1	0	1	1	1	0	1
N W T.	3	1	3	2	2	1	1	1	0	0	1
N S	1	1	1	0	0	0	0	0	0	0	0
Ont.	3	1	2	1	1	1	1	1	1	0	1
P E I	2	2	2	2	2	1	0	1	0	0	0
Que.	1	1	1	1	1	1	0	1	0	0	0
Sask.	2	2	2	2	2	1	1	1	0	0	2
Totals	29	15	26	15	14	8	4	9	2	0	7

The following are the findings of the comparative analysis, item by item:

Item #1: Right to remain silent.

Only fifteen (15) of the twenty nine (29) policies had a provision within their policy statements that a student had the right to remain silent. The right not to say anything is a fundamental common law right, and failure to explicitly state such a right is grounds for the courts to refuse to admit a statement. Thus, fourteen (14) of the policies, the interrogation of a student would be void abinitio from the start.

Item #2: Right to talk to parent or an "Appropriate Person."

In this category, there was a hundred (100%) compliance with the requirement that a parent or a suitable "other person" chosen by the student should be contacted before the interrogation would be allowed to commence. In all twenty nine policies (29) there were instructions that a parent must be allowed to speak to the student, or at least be advised of the situation, and permission sought to interrogate the student. However, no mention was made that the YOA had been amended in 1988 to expressly provide that a teacher would be deemed to be an "appropriate person" under the provisions of the Act. In several instances there was an express statement to the contrary, that: "Teachers should not participate."

Item #3: Statements must be made in the presence of the parent or "Appropriate Person"

In only fifteen (15) of the twenty nine policies (29) there was a provision to include the fact that a parent, or an "appropriate person" has the right to be present during the interrogation process.

Item #4: Right to legal counsel.

In fourteen (14) of the of the policy statements, there was no mention of the right to consult legal counsel.

Item #5: Waiver of rights must be in writing.

In only eight (8) out of the twenty nine (29) instances was there a provision within the policy statements that any waiver of rights must be in writing. However, there were several jurisdictions within the survey that had prescribed forms printed for use by the investigating police officers.

Item #6: Clear language tailored to the age and understanding of the student.

The courts have indicated that a student must be told of the alleged charges or the reason for the interrogation *in clear language suited to the age, and understanding of the student*. In only four (4) of the policies was there any mention of this important element. All Alberta respondents were completely silent on this important provision which is specifically related to young offenders.

Item #7: Legal consequences of making a culpable statement.

In only nine (9) of the policies was there mention of the the legal consequences that flowed from the making of culpable statements. Twenty (20) policies were silent in this regard,

Item #8: Transfer to adult court.

Only two (2) out of the twenty nine policies (29) were students over fourteen (14) years of age told of the possibility of transfer to adult court in cases of serious (indictable) offences. If the recent contemplated changes to the YOA are implemented (Bill C-12, presently in the Senate) that prescribe increased sentences in such cases, these omissions may have a serious consequences for young offenders.

Item #9: Special consideration for retarded students.

All twenty nine policies (29) in the eleven (11) school board jurisdictions there was a failure to make mention of the requirement that special considerations must be applied to retarded or impaired students.

Item #10: Specific reference to YOA, and section 56.

Seven (7) out of a possible twenty nine (29) policy statements contained specific reference to the YOA, and only a little over one percentage (1%) had any specific reference to the rights contained in section 56 of the YOA.

Summary

Unfortunately, the statistics speak for themselves. It is difficult to imagine a worst scenario of violations of student rights in the school setting if the policy statements correctly reflect the actions of school officials in the legal issues under review. It appears from this analysis, that school officials do little more than to contact parents (26 out of 29 policies) in circumstances giving rise to the application of YOA. Further comments will be offered of this comparative analysis at the conclusion of this thesis.

PART TWO

An Examination of the Policy Statements Relating to the Issues of Search of the Person, and Search & Seizure of Personal Property

Introduction

An examination of the data relating to the issues of search of the person, and search and seizure of personal property, revealed that only twelve (12) of twenty nine (29) policies had statements relevant to these issues.

Accordingly, the sparsity of data was not conducive to an analysis using frequency counts. It would not be useful or meaningful to examine the twelve policies for generalizations applicable to a larger sample. The range would be so limited as to make any statistical analysis unreliable.

The nature of the issues also made the formation of criteria against which the policies could be compared difficult to establish. For example, there have been very few cases in the school setting that have given rise to provide direction in the establishment of clear criteria. The issues are always reduced to what was "reasonable" under the circumstances of the particular case under review.

The methodological approach utilized in PART TWO of this study was to formulate general "areas" must be covered in policy statements. In other words, the approach was to identify instances in which the courts have concluded that certain courses of conduct have given rise to concern. Such "areas" may contain specific directives of "what not to do," while other areas may suggest essential elements of specificity that must be present in any "reasonable" policy statement.

Since the areas of concern are few in number, the areas so identified were applied to searches of both the person, and search & seizure of personal property.

Areas of Concern in the Implementation of Searches of Students' Person and Personal Property

Introduction

After each "area of concern" has been identified, a short discussion will follow on the rationale that the courts have applied in certain instances. Following the identification of the "areas of concern," several administrative suggestions will be made based upon an examination of the "better" policy statements within the survey.

In the summary, comments will be made on the contents of the twelve (12) policy statements relating to the effectiveness of such policies based upon the "areas of concern" identified in the court cases. In addition, comments will also made on the administrative procedures which were found from an examination of the policy statements themselves.

Basis for the Search

The basis of any search is that it must conform to section 8 of the Charter which states: "Everyone has the right to be secure against unreasonable search or seizure".

If a search is found to be "unreasonable" it is then subject to further analysis to determine whether it is reasonable under the balancing provisions contained in section 1 of the Charter.

If the search is still held to be unreasonable, it must then be reviewed under section 24(2) which states that evidence may be admitted if the admission "would not bring the administration of justice into disrepute."

What is deemed to be an "unreasonable" search and seizure is dependent upon the circumstances in each particular case. In other words, what is "unreasonable" in a locker search for overdue library books may be held to be reasonable if the search was for a loaded hand gun.

The U.S. case of New Jersey v. T.L.O. (1985) where the U.S. Supreme Court held that searches made only on "suspicion," or arbitrarily made, will give good cause for legal redress on behalf of the student even when illegal substances are found. This case also stands for the proposition that a search will be held to be reasonable if (a) the search was justified in the first place based upon "reasonable" grounds, and (b) the actual search was "reasonable in scope" to the set of circumstances in the first instance.

As has been shown in Chapter 4 of this thesis, the court in the J.M.G. case held that searches that are "administrative" in nature are subject to a lesser standard of "reasonableness", that which implies a "reasonable suspicion" base. Through the legal technique of analogous reasoning, the case of R. v. H. examined in Chapter 4, stands for the proposition that where a school official acts as an agent for the state in criminal matters, then the higher standard of "reasonable and probable grounds" applies.

These legal issues have yet to be decided upon by the Supreme Court of Canada. Consequently, in absence of definitive legal directives as to what may constitute the correct base for a "reasonable" search within a Canadian school setting, for the purposes of the evaluation of policy statements in this study, the criteria will be as follows:

Administrative searches: "reasonable suspicion"

Searches in criminal matters: "reasonable and probable grounds"

General searches. General exploratory searches are *prima facie* unreasonable. Courts in Canada and the U.S.A. have held that to subject a larger group of students to invasions of privacy looking to find guilt of one or a few is not only unfair but unreasonable. It also may be illegal as was shown in Chapter 4. This is applicable to searches of the person, and, even more relevant, to "strip searches."

Searches of the person and strip searches.

Searches of the person have been held to be highly intrusive, and should not be conducted by school officials. Even in the case of a solid factual situation based upon "reasonable and probable grounds," such searches should be left to police authorities. This situation applies even in cases where the courts have held that:

> We recognize, however, that teachers have a unique relationship to their students both in administering discipline as part of their educational function, and in protecting the well-being of all children in their care and custody. Accordingly, these interests justify great flexibility when applying the Fourth Amendment in a school setting.(*M. M.* v. *Anker* ,(1979), p. 589)

Administrative Considerations Emanating from an Examination of the Policy Statements

Upon examination of the twelve (12) policies that had materials on the issues of search of the person and search and seizure of personal property, there were several areas covered which may be of assistance to educators. Although these areas, in themselves, are not directly germane to the issues under review, they may nevertheless be of interest to school officials. There are four areas of potential interest.

1. Try to Obtain the Student's Consent to the Search

A person can consent to the search of his or her body, although, this basic premise in a school setting is tempered to the age and understanding of the child.

The courts have held that it is reasonable for a school official to request that a student empty his pockets when the school official is acting in an administrative capacity as in the factual situation in *R*. v. *J.M.G*. (1986). However, when the request is made in the pursuant of evidence of criminal activities, then such a request would be deemed to be in violation of a student's rights under the YOA. In *R*. v. *H*. (1986), the court ruled that the YOA had application in criminal matters and failure to tell the student his rights under the Act rendered the evidence inadmissible.

This situation of a search in matters of criminal activities may still fall under the _Charter_ if the reasoning of MacKay and Sutherland (1992) is applied by the courts. That is, if the school official is a "person in authority," and deemed to be acting as agent for the state, then _Charter_ protection must also have application in the school setting.

Whenever in doubt as to the reasons for the search, and notwithstanding that in criminal matters asking the student for his consent may result in the invalidation of any evidence found, the steps leading up to the search would be taken into consideration by the courts. As has been identified in the _Heisler_ case, a search may be illegal but still "reasonable" under section 8 of the _Charter_. The ultimate decision rest with the Supreme Court of Canada as the _J.M.G._, _R_. v. _H_. and the _Heisler_ decisions are at the Court of Appeal level.

2. _A Search of a Student's Personal Property Should Always Be Done in the Presence of the Student_

This element is not only based on reasonableness, but also in law. For proper identification of personal property, it is essential that ownership is established. Admission by a student of ownership of personal property is the easiest way of proving not only ownership, but "possession."

In the search of a locker, this is an essential requirement, as in most cases the locker is the property of the school. The establishment that the student had "control" of the locker is *prima facie* proved by the student being present, and the unlocking being done with his or her own key. Absence of the person suspected of a school infraction, or the possession of illicit substances may give grounds for the courts to hold that the search was "unreasonable" and perhaps even illegal. Argued another way, if a student is present when the unlocking is being done, evidence of reasonableness is present. Again, as has been pointed out in relevant sections of this thesis, the courts have given school officials great latitude in school matters and especially where drugs are involved.

3. The Search Must Be Conducted in the Presence of an Independent Witness

This is essential for evidentiary reasons.

4. Proper Documentation Must Be Kept of the Search process

This is necessary for evidentiary reasons.

Assessment of the "Areas of Concern"

Basis for a Search

Of the twelve (12) policy statements relating to the search of a student's person, and the search & seizure of personal property, seven (7) policies expressly invoked the "reasonable and probable grounds" basis for all searches, whether the searches were to be conducted under the heading of "administrative" or "agent for the state."

Three (3) of the policies contained a general discussion on the basis for a search, and opted for the lesser standard of "reasonable suspicion."

One (1) policy provided no direction regarding the basis of a proposed search, and one (1) other policy referred only to searches made by the police that required a warrant before allowing a search of the person or personal property.

General Searches

None of the policy statements (100%) had a directive that general searches are *prima facie* unreasonable in their policy statements. On the contrary, all had express statements that general searches were allowed almost at will. All of the statements related to locker searches contained statements that general locker searches could be conducted "whenever," at "any time without notice." Other policy statements stated that general locker searches could only be conducted at the discretion of the principal, but permitted "random searches." One policy had a written "waiver" form wherein the student granted permission to school authorities "that a search could be made at anytime."

One well-worded policy stated that a search could be made at any time provided that there had been established "reasonable and probable grounds." The policy further stated that under no circumstances could possessions found in the locker be searched.

Searches of the Person and "Strip Searches"

Seven (7) of the policies directed that searches of the person, including "strip searches," should not be conducted by school personnel and that such searches should be left to the police.

One (1) of the seven (7) policy statements, however, stated that a search of the person would be allowed if permitted by the student. The same policy also had a directive that a strip search could be conducted if there had been "visual confirmation" that illegal contraband had been hidden in undergarments.

Administrative Considerations Emanating from an Examination of the Policy Statements

The four directives contained in a review of the "better" policy statements were as follows:

1. Try to obtain the student's consent to the search;
2. A search of a student's personal property should always be done in the presence of the student;
3. The search must be conducted in the presence of an independent witness;
4. Proper documentation must be kept of the search process.

These directives may not a necessity in law. However, they do make good administrative guidelines. Clear documentation provided to a court on the issue of the "reasonability" of a process will add credibility to the intent of any policy statement. As this thesis has shown, the law if filled with uncertainties, and many times, in a state of flux. Administrative decisions based upon clear statements of intention which are carried out in conformity to such policy statements, and with consistencency, could be considered the very essence of "reasonability."

Summary

The majority of the policy statements addressed the thorny problem of establishing the correct basis for a search of the person of a student. That is, seven (7) "reasonable and probable grounds," and three (3) "reasonable suspicion" policies gives rise to a clear understanding of the issues involved. Only two policies (2) had difficult with establishing a correct policy statement.

None of the responding jurisdictions had correctly assessed the issue of locker searches. Quite the opposite, all of the policy statements appeared to indicate that the school owned the lockers, and therefore they were entitled to search their own property at any time and under any conditions. The law would appear to indicate that even if it is decided that the lockers are owned by the school, any searches must still meet the "reasonable" criterion under section 8 of the Charter. Once it has been proven that a "right" exists, (and a rental or lease of a locker would be evidence of such a right), the onus then shifts to the "searcher" to present evidence of the basis and "reasonability" of the search.

Further, the courts under common and statute law have taken the stand that general searches are *prima facie* "unreasonable." Unless a lower standard of proof is held to be placed upon the school authorities, the onus is still on the educator to prove that the search was not "unreasonable." The search for drugs or dangerous weapons would, more than likely, be an exception to the general rule. Application of section 8 of the *Charter* to schools has yet to be decided upon by the Supreme Court of Canada.

Seven (7) of the policy statements had correctly assessed the problems of conducting searches of the person which included "strip searches." However, the remaining five policies (5) seemed to be defective in this area..

CHAPTER 6

SUMMARY OF THE ISSUES, IMPLICATIONS, CONCLUSIONS AND RECOMMENDATIONS

Summary of the Issues

The purpose of this thesis has been to examine the impact the Charter and the federal Young Offenders Act may have on the operation of schools in the K - 12 educational system in Canada. Since the Charter is part of the "supreme" law in Canada and the federal Young Offenders Act has jurisdiction over provincial and federal territorial authorities, it was deemed important that this thesis address certain problems that might face school officials every day in the operation of schools throughout Canada.

More specifically, this thesis has examined the issues of detention, search of the person, search & seizure of personal property under the preamble, and sections 1, 7, 8, 9, 10 and 11 of the Charter. The issues of interrogation, and the admissibility of culpable statements of students made to school officials, was examined under section 56 of the YOA. The analysis was made within the context of actions of education authorities relative to student activities in the school setting and during school hours.

Clearly, the Charter has placed a mandate upon school authorities to examine existing policies to ensure that such policies conform to it. The effect of the Charter, in particular, may be far reaching in many areas of educational endeavours such as discipline, teacher and student rights.

School officials need current legal information in order to make informed decisions on matters that may have legal consequences, and to further ensure that policy statements are in conformity with legal requirements placed upon them in the school setting. To this end, I first conduced a legal analysis of Canadian and United States court decisions relative to the issues under review and summarized the findings. Criteria were developed from British and Canadian common law and specific statute law under the JDA and YOA.

A survey was then made of certain school jurisdictions throughout Canada and school policy statements were examined. for the analysis of interrogation procedures and the admissibility of culpable statements under the YOA. "Areas of Concern" were established relative to the issues of detention, search of the person and search & seizure of personal property. A comparative analysis was then made between the "Law" and elements contained in the policy statements. The methodological approaches of description and content analysis were utilized in the examination processes.

Detention

This area of the law appears to be reasonably clear. Detention in the form of discipline for infractions of school policies governing student conduct, as opposed to detention of students for interrogation purposes, appears to fall outside the ambit of Charter and the YOA jurisdiction. The Ontario Court of Appeal in the J.M.G. and L.L. decisions clearly felt that "administrative" decisions in the every day operation of schools fall outside Charter provisions and jurisdiction of the federal YOA.

Likewise, the Alberta Court of Appeal in R. v. H., in obiter dicta, ruled against the application of the Charter in criminal matters. However, the Court stated that, in criminal matters, the YOA is the appropriate statute under which young offenders should be assessed. Dickinson (1989) summed up the situation succinctly as follows:

> The decisions of the Ontario courts in J.M.G. and L.L. are distinctly conservative and authoritarian. They provide strong judicial reinforcement of the exercise of traditional authority in schools. Principals' worst fears about the Charter's undermining of their disciplinary authority have thus not been realized in Ontario. Similarly, the Alberta decision casts doubt on whether the Charter will ever be held to apply at all in school setting. The Alberta case, however, clearly conveys the message that educators may be seen in law to be "persons in authority" for the purpose of receiving confessions from students and hence that they will be held to the strictures of the Young Offenders Act. (p. 215)

Tinsley and Manley-Casimir (1987) are of the same opinion on criminal activities of students:

> Our position is that school officials - principals, counselors, and classroom teachers - when questioning a young person about suspected criminal activity, are indeed persons in authority as defined in law, and therefore are obligated to fulfill the requirements found in section 56 of the YOA. (p. 1)

One of the difficulties that the Supreme Court of Canada must ultimately address is the formulation of a current definition of the role of the educator within contemporary society. There has been a discernible change away from the transfer of authority from the parent to the school official under the doctrine of _in loco parentis_ towards a quasi-judicial role of "agent for the state" under the statutory provisions of certain School Acts. The Ontario Court of Appeal in the _J.M.G_. case espoused the administrative role of the school official, and yet the rationale was grounded in statute law.

The Alberta Queen's Bench acting in the capacity of an Appeal Court from a provincial court decision in _R_. v. _H_., held that the educator was indeed a "person in authority" and subject to the provision of the YOA. However, in the same judgement, the Court decided, albeit in _obiter dicta_ that the _Charter_ had no application in the criminal matter under adjudication.

To decide that the YOA was the appropriate piece of legislation in one issue of criminal activity is one thing, but to state that the Charter has no application in all matters of a criminal nature in the school settings is yet another matter. This is not to say that the YOA is not the appropriate statute in criminal matters, but in cases where matters of a criminal nature give rise to civil law suits the YOA may not be the appropriate statute. Other adults, whom are not school officials may cause a young person to react in a criminal manner upon unlawful detention. Self defence against an adult attacker that may be deemed reasonable under the YOA or the Criminal Code may not deter a subsequent civil law suit for personal injury damages. Likewise, in the same factual situation, what would happen if a school official acted maliciously and outside his or her scope of authority?

Upon the reading of sections 9, 10 and 11, it is clearly evident that such sections apply to "arrest and detention" in the criminal sense to all person protected by the Constitution. There may be countless situations where the YOA would not apply to criminal activities in the school setting. Two that are clearly identifiable are: (1) A young offender who turns into an adult while still attending high school, and (2) A young offender subject to the provisions of the YOA, but who is subsequently transferred to adult court.

The point that Bala (1984) made in relation to both the J.M.G. and R. v. H. decisions may have some merit: "It can be argued that at least in the context of the criminal proceeding, the school official was an "agent for the state" and obliged to comply with ss. 8 to 10 of the Charter" (p. 65).

As previously stated in Chapter 3, the legal confusion adds more pressure to the role conflict under which all school officials must operate. Such inconsistences must be resolved by the Supreme Court of Canada.

It is interesting to note that the analysis of the school district policy statements revealed that "detention" appeared not to be an issue in the minds of the policy makers. There was very little attention given to the legal implications raised by the term "detention" under either the Charter or the YOA.

Search of the Person and Strip Searches

As a necessary prerequisite to the issue of searches generally, Chapter 3 involved a discussion on the related issues of "life," "liberty," and the "security of the person." After examination of such concepts, the analysis proceeded to consider the term: "principles of fundamental justice" within section 7.

It is reasonably clear that the concepts of "life" and "liberty" will not likely be developed to the extent that they have been in the United States. The U.S. and Canadian bases for their respective constitutions are far too different. Traditions play an important part in the interpretation of constitutional rights and freedoms.

Needless to say, Canada and the U.S. may have many commonalties, but it is the differences in the attitudes of the people that form the basis for legally entrenched rights and freedoms.

Following the decision of the Supreme Court of Canada in Re S. 94, it would appear that there is room for the introduction of substantive law into section 7 of the Charter. It is unlikely that "fundamental justice" will encompass the underpinnings of the U.S. term "due process." This was made clear in Re. S 94. However, it will mean more than the interpretation given to the British term "natural justice." Within the Canadian context, the concept of "fundamental justice" will no-doubt be pulled one way or the other, depending on the current trends, legally, politically and economically. More than likely, "fundamental justice" will develop either in a pro or anti American way dependent upon future Canadian sentiments towards British influence.

The thrust of section 8 of the Charter is that a person is only protected from "unreasonable" searches. As the data emanating from the court cases have indicated, the courts have had considerable difficulties in the interpretation of the doctrine of reasonableness, which is, of course, the flip side of the issue. The doctrine of "reasonableness" is dependent upon the circumstances in any particular case. It is, therefore, difficult to form generalizations that may have application to schools.

Keeping in mind that what is "reasonable" or "unreasonable" may also be subjected to the "balancing" test under section 1, and the exclusionary rules contained in section 24, the basis for a reasonable search within the school setting appears to be "reasonable suspicion" and not "probable cause."

Interestingly enough, the analysis of the policy statements showed that seven (7) of the twelve (12) of the policies expressly invoked the "reasonable and probable grounds" for searches of both the "person" and "personal property." Of the twelve policies ten (10) of the policies had complete compliance with the legal requirements. Only two (2) policies were deficient in statements establishing a reasonable basis for conducting a search.

Searches of the person are clearly an invasion of privacy. Strip searches are the most intrusive of such violations. The U.S. case of T.L.O., in the absence of Canadian jurisprudence in this area of the law, established a "reasonable" balance between the need of school officials to enforce rules and regulations and the students right to privacy. The two-fold test formulated by the court emphasized the need to keep the actual search within the bounds of the initial assessment of the circumstances in the first instance. The more intrusive the search, the more solid evidence would be required by the courts in order to validate the search as being reasonable. Lesser searches of personal property on the person of the student may be deemed "reasonable" limits pursuant to section 1 of the Charter, especially where the search is for illicit drugs. One of the school jurisdiction surveyed expressly permitted "strip searches" for illegal drugs if "visual confirmation" had been made that such illegal contraband had been hidden in undergarments.

The analysis of the policy statements revealed that seven (7) out of the twelve (12) policies directed that searches of the person, including "strip searches" should only be conducted by a police officer. Based upon the "Areas of Concern" criteria, six (6) had correctly assessed the problems of conducting "searches of the person" which included "strip searches." However, the other six (6) had defective policy statements.

Search of Personal Property

There appears to be a lesser onus on school officials to justify searches of a student's personal property. Perhaps, such is due to the fact that searches of inanimate objects are far less intrusive than a body searches and especially a "strip searches." Nevertheless, searches of personal property must not be "unreasonable" under section 8, and if held to be unreasonable then "reasonable" by societal standards under section 1 of the Charter.

It would appear that warrantless searches and "general" searches are *prima facie* illegal and invalid. The sole exception to this general rule is in the case of "dangerous substances" where searches are deemed "reasonable" and not a violation of section 8 of the Charter. This would appear to be especially true within a school setting where drugs are the basic issue. This position is supported overwhelmingly by United States cases.

The analysis of the policy statement showed that 100% of the policies did not contain correct information on the prime directive that general searches are prime facie unreasonable. On the contrary, all of the policies had statements to the effect that it was the right of school officials to conduct searches of the personal property of students whenever, and under whatever circumstances, the school authorities deemed appropriate.

Interrogation and the Admissibility of Culpable Statements

The YOA, in section 56(1) adopted the common law rules relating to the taking and admissibility of culpable statements. The ten (10) components that made up the criteria to be applied were identified and taken from the case law of both Britain and Canada. The comparative analysis between the legal requirements and the actual directives contained in the policy statements was undertaken in Chapter 5. As was shown, there were serious deficiencies in the overall compliance level contained in the policy statements. Fifteen (15) of the twenty nine (29) policy statements would be deemed void because the directive that the student has the fundamental "right to remain silent" had been omitted from onset.

Although 100% of the jurisdictions had confirmed the right of a student to talk to a parent or an "appropriate person" designation under the YOA, only fifteen (15) of the policies contained a directive to inform the student that the Act states that a parent or an "appropriate person" has the right to be present during the interrogation process. In fifteen (15) of the policies there was no mention of the "right to consult with legal counsel."

Of great concern were the findings that only four (4) of the twenty nine (29) policy statements contained the prime directive that students must be informed of the charges and the reasons for the interrogation in "clear language tailored to the age and understanding of the student." Of even greater concern was that in only two (2) of the cases out of twenty nine (29) did the policy statements advise the student of the possibility of "transfer to adult court" for serious offenders.

The special rights of retarded students had been completely missed by all of the jurisdictions, and only seven of the 29 policy statements contained specific reference to the YOA at all. One sole policy had specific reference to the rights contained in section 56 of the YOA, and this was by way of a photocopy of the section attached to the policy statement.

As was shown in Chapter 4, the application of section 56 of the YOA and the interrelation of the subsections makes the admissibility of culpable statements virtually impossible.

The basis for the admissibility of culpable statements lies within the basic framework of the requirements of the British common law system which is embodied and codified in section 56(1) of the YOA. The criteria relating to the voluntariness of the statement, the issue of "persons in authority," the right to consult with an "appropriate person," and the right to make any statement in the presence of that person, coupled with the "right to legal counsel" makes for a formidable network of legal safeguards. The Legal Aid Society of Alberta (1984) clearly assessed the situation, and in my opinion, somewhat understated a clear premise: "Obviously statements of young persons are going to be difficult to admit. The Crown must satisfy the specific criteria of s. 56(2)," (p. 13).

The waiver provisions add closure to the admissibility of culpable statements in that, not only must the waiver be in writing, but the young offender must be apprised of his or her rights before the signing of such a document. Since one of those rights is the to "right to consult with legal counsel," the possibility of a statement being drawn up, is remote.

Even if the young offender went ahead and signed the waiver on his or her own initiative, it is extremely doubtful that a minor in Canada could legally execute such a document. Without legal counsel, the minor would not be competent in the eyes of the common law under the *sui juris* doctrine. Only two (2) of the twelve (12) school district policy statements had a reference that the "waiver" must be in writing.

The sole exception to the rule appears to be the admissibility of "spontaneous statements" made by a young offender during or shortly after the commission of a crime. Such have been admitted upon the premise that words spoken in haste, or spontaneously made, are usually truthful.

The legal guidelines for the taking of statements were fully discussed in Chapter 4. The evidence contained within the policy statements as to the requirements contained of section 56 of the YOA is irrefutable. The cumulative effects of failure in one or more of the areas as outlined in the predetermined criteria relating to interrogation and the admissibility of culpable statements renders almost all of the policy statements contained in this analysis void and of no legal effect.

The policy statements did fare better in relation to the "Areas of Concern" relating to the issues of "search of the person" and "search of personal property." Since these areas of the law are less clearly defined than interrogation procedures and the admissibility of culpable statements, any "reasonable" policy statement would more or less be acceptable by the courts. With the exception of the conduct relating to "general searches," ten (10) of those twelve (12) jurisdictions reporting they had policy statements appeared to have met the requirements for the basis of a "reasonable" search. In Charter terms, 88.33% of the searches made in accordance with the policy statements would, most likely, have been found to be not "unreasonable" pursuant to section 8 of the Charter.

Unfortunately, locker searches, based upon the attitudes expressed in 100% of the policy statements, would have given the courts cause for concern. Ownership of the lockers does not give the right to school officials to conduct arbitrary searches. General searches are *prima facie* "unreasonable." Consequently, the onus is on school authorities to prove that the search was not "unreasonable." The exception to the general rule appears to be in the case of drugs or dangerous weapons where the courts have given great latitude to school officials.

The "better" policy statements contained provisions for obtaining the student's consent to the search, the search to be conducted in the presence of the student, with independent witnesses and proper documentation.

Implications

The implications for educators, as a result of this study, are numerous in detailed application and yet are few from a substantive point of view. The last several decades have brought about a change of attitude in governments, business and cultural entities in the manner in which individuals are treated in society. From the fall of the Soviet Communist government to the "Feminist" movement, and other social upheavals, we are faced with indicators that there is a discernable trend worldwide to establish a new "age of rights" for all peoples. This trend must include children.

If the Charter is to have any impact on how governments and institutions deal with its populace it must not relegate children, *qua* students, to being second class citizens. MacKay (1987), in an article entitled "Students as second class citizens under the Charter" attacked the *J.M.G.* decision and concluded that Justice Grange was of the "old school" of thought in his regressive judgment. MacKay (1987) stated:

> In addition to sins of commission in *R. v. J.M.G.*, there is a significant sin of omission. Grange J.A. does not clearly articulate the theory of education that underlies his legal conclusions. Implicitly he adopts an educational theory that emphasizes the value of order, educator's discretion and informal dispute resolution. In so doing, limits are placed upon a theory of education that puts greater stress on student autonomy and the exercise of individual rights.(p. 400)

MacKay (1987) leaves no doubt as to how he feels on the subject matter when he concluded:

> It would have been helpful to have some of the competing theories of education discussed before considering the legal implications. The education theory should condition the appropriate legal structure, and not the reverse. On this point Grange J.A. and I appear to agree. Where we fundamentally disagree, I suspect, is on the proper role of education in Canadian society, (P. 400)

I am of the opinion, that the status quo cannot be allowed to continue in a system that fails to adhere to the requirements of the law of the land. The attitude that it is "business as usual" is "unreasonable" whether under section 1, or section 7, or any other section of the Charter. Children are not second class citizen; they are the future of and for Canada.

Educators are increasingly being placed under more pressure in their educational role for many reasons. The breakdown of marriages, poverty, and political apathy are just a of few of the elements that have impinged upon the role of educators in changing societies. Change brings with it many uncertainties that give rise to inappropriate reactions.on the part of decision-makers. MacKay (1987), referred to the decision in the J.M.G. case as containing both "commissions" and "omissions" which amounted to "sins" against student rights. It is imperative that teachers and administrators become aware of student rights and the delicate balance between "privacy" and the right of the educator to maintain discipline in schools.

In an article (Pritchard, 1989, b), I pointed out the difficulties in the area of search of the person and search and seizure of personal property in the school setting. This thesis has expanded on the need for legal literacy for school personnel.

If criminal activity in the school system increases in the future then educators will undoubtedly become more clearly agents for the state in a policing function rather than in an administrative role. Clear written policies that incorporate the requirements of the law are essential. As has been shown in this study, those jurisdictions that responded scored a 34 percent overall compliance level to legal requirements under the _Charter_ and a complete failure rate under section 56 of the YOA.

As individuals, educators should not share in any of the blame. It is the system that is at fault, but it is only educators that can, _or should_ change this deplorable situation. The courts are not the proper format for dealing with this problem. In the "age of rights" the right action should lie with educational personnel. It is they who can immediately right obvious wrongs in legal literacy without the necessity for outside intervention.

This thesis has shown that the preamble, sections 1,7, 8, 9, 10 and 11 of the _Charter_ and section 56 of the federal YOA have placed a mandate upon educators to ensure that policies and rules conform with legal requirements. This is not to say that schools cannot have policies in the areas of detention, search of the person, search and seizure of the person and interrogation procedures, but it does mean that such policies and rules must take into consideration the rights of students.

Conclusions

Rights and freedoms under the Charter in the K-12 school jurisdiction have yet to be ruled upon by the Supreme Court of Canada. Even when a legal framework is eventually developed it will be necessary to clarify many thorny legal issues surrounding the Charter and its application to schools. The legal analysis of the four issues, the subject of this thesis, has shown the complexities involved with the interpretation of the law as it applies to schools.

This thesis has shown that the school board policies which were examined, do not generally meet the legal provisions contained in section 56 of the YOA. Even where attempts had been made by educators to be "reasonable," the policy statements still did not conform to the legal requirements of the Act. In many instances the policy statements contained misinformation. In several instance, there was evidence of complete disregard for the law.

Recommendations

Recommendations in the specific areas covered by this thesis are few. If educators are going to interrogate students in suspected criminal matters, then the YOA must always be in the forefront of the educators' thoughts. Reference to section 56 is mandatory when contemplating the taking of culpable statements. It is hoped that the issues contained in the predetermined criteria are helpful in this regard. The "legal guidelines for the taking of statements" enunciated by the courts and referred to in Chapter 4 should always be followed.

When making a search of the person, extreme care should be taken to make sure that facts leading up to the decision to conduct a search are clear and unambiguous. The more intrusive the search, the stronger the justification must be for the search. Conduct any search quietly, privately, and with the minimum of intrusion. Never conduct a general search of any kind, especially if it is a "fishing trip." The courts in the United States have taken a dim view of subjecting many to searches at the expense of a few. If there is a legitimate reason for conducting a general search, as in the case of a search for delinquent library books, give advance written notice to the student populace. Leave "strip searches" to the police.

Finally, keep the parents apprised of all contentious matters, and endeavour to contact them prior to taking any course of action. If the situation involves danger, of any kind, then the courts will allow the educator great latitudes in the actions taken. Act accordingly.

Future Emphasis for Legal Reform in the Education System

The available data contained in the policy statements appear to indicate that educators are not sufficiently knowledgeable in legal matters that directly affect them.

Bargen (1961), stressed the importance to educators of keeping abreast of legal decisions which not only have direct bearing on educational matters, but also jurisprudence which may affect school administration in the near future.

Dickinson (1989), some 28 years after Bargen's basic plea for educators to take an active role in assessing legal issues that affect them, is even more emphatic on the issue of legal literacy for educators:

> Some educators will think themselves compromised by this legal characterization of their role. They may, indeed, view the legalistic litany imposed by the Young Offenders Act as at least an implied invitation to remain silent and save one's own skin, and thus inimical to their role as moral guide and exemplar. To this extent, it may seem that they are taking a hand in reinforcing the perception that it is socially acceptable to attempt to avoid accountability for one's misdeeds. (p. 217)

Crawford and Lightbown (1989) take a more positive approach to the acceptance of legal literacy in educational institutions generally, and they take a reasoned approach towards educating educators specifically. They make the following observations:

> Charter provisions contain very general terms and specify a variety of conditions. The exact nature and extent of our rights are determined by the courts as they apply the Charter according to established modes of reasoning. While these legal guidelines and rules are complex and often controversial, the basic elements can and should be understood by non-lawyers. Without wider understanding, public confusion about Charter rights and unwarranted cynicism about judicial integrity may be unavoidable.
>
> Adults and students who understand the basic elements of judicial reasoning will have taken a

> significant and, perhaps, requisite step towards coming to know and appreciate the rights to which they are entitled under the Charter. (p. 220)

MacKay (1986, p. 11), a proponent of legal education for educators, advocated changes in attitudes relating to legal literacy that start from the top of the hierarchy if the educational system is to become enlightened.

The Charter, and the YOA, reflect the impetus for changes which educational administration must be prepared to accommodate. Menacker and Pascarella (1983) in a survey of 299 principals and vice-principals on 13 U.S. Supreme Court decisions affecting education, gave such educators only a 64.4% passing grade:

> Most important, our findings reveal an ineffective and haphazard communication network . . . . The dispensing of information on school law should begin in teacher preparation programs, should continue in programs preparing school administrators, and should become a regular part of in service programming for educators at all levels and in all locations. (p. 426)

Hazard (1975, p. 608) and Hummel (1985, pp. 3-11) supported this proposition. Schimmel and Fischer (1988) offered an explanation for this serious deficiency of United States educators:

> Why are so many educators poorly informed about the rights of parents and students? Because most of these rights did not exist when the educators were students and because they learned almost nothing about this subject during their education. As a result, they have had little training in applying these rights in their schools, and little has been written that could assist them. (p. 2)

Schimmel and Fischer (1988, p. 232) pointed out that fewer than 20% of university students have been exposed to law-related education. Zimmerman (1974) believed that "if the American democracies are to approach the twenty-first century as a strong and viable system, the young people in our schools must be well-versed and competent in handling guaranteed human rights" (p. 247).

Watkinson (1986) assessed the situation realistically:

> Finally, not only do educators need a general understanding of the Charter and its implications, but, perhaps more importantly, they need to be concerned about their attitudes towards student rights and the effect these attitudes have on the education system . . . . Educators already seem impatient with the role the courts are playing in the education system, but this is not going to change. If anything, the role of the courts will increase. It is hoped that if school leaders have an accurate understanding of court decisions affecting them, they may find them a help rather than a hindrance and, at the same time, avoid the cost and disruption of legal challenges. (pp. 8-9 and p. 11)

Educators must examine the Charter in greater detail in future research projects so that they can more clearly identify issues that affect school matters and make intelligent decisions on educational policies and procedures.

Sussel and Manley-Casimir (1986), in a provocatively named paper "The Supreme Court of Canada as a 'National School Board': The Charter and Educational Change," warn of inaction on the part of the education community in legal matters:

> Clearly, the imposition of judicial standards with constitutional force would alter the administration of schools and would increasingly cause administrators to acknowledge the constitutional

> interests of students, parents and teachers. Developing the most desirable combination of constitutional protections and administrative practices no doubt will become one of the most important issues on the Canadian education agenda in the years and decades ahead.
>
> The judiciary does have a real opportunity to play a vital and significant role in promoting the idea that constitutionally protected interests of Canadians in education must be recognized by school authorities not just rhetorically but practically. (p. 228)

MacKay and Sutherland (1992) sum up my sentiments concisely. Consequently, I conclude this thesis with the hope that the issues raised in the analysis together with MacKay and Sutherland's poignant statement will be positive notes of encouragement for educators:

> The meshing of statutes, regulations and policies was difficult even before the *Charter*. The additional challenge of the *Charter* ... has sent some educators scurrying for cover. However, the number of actual *Charter* challenges have been few. There is still time for educator to put their own houses in order, before the courts require them to do so. A careful in-house review of rules, procedures and penalties may prevent legal action and give educators a greater sense of being in control of their own destiny. Action is better than reaction. (p. 11)

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R. v. *Kind* (1984), 50 Nfld. & P.E.I.R. 332 (Nfld. Dist. Ct.)

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R. v. *Lerke*, [1986] 67 A.R. 390 (Alta.C.A.), affirming (1984), 41 C.R.(3d) 172 (Alta.Q.B.)

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Wisconsin v. *Yoder*, 406 U.S. 205 (1972)

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LEGISLATION

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Canadian Bill of Rights, S.C. 1960, c. 44; R.S.C. 1970, Appendix III.

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Constitution Act, 1982, as enacted by Canada Act 1982 (U.K.), c. 11.

Criminal Code, R.S.C. 1985 c. C-46.

Young Offenders Act, R.S.C. 1985 c. Y-1; 1980-81-82-83, c. 110, s.1.

APPENDICES

APPENDIX "A": REPORTING SYSTEMS

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Canadian

A.C.W.S.	All-Canada Weekly Summaries
A.R.	Alberta Reports, 1975-current
Alta.L.R.	Alberta Law Reports, 1908-1932
Alta.L.R.(2d)	Alberta Law Reports (Second Series)
B.C.L.R.	British Columbia Law Reports, 1976-current
B.C.R.	British Columbia Reports, 1867-1947
B.C.W.L.D.	British Columbia Weekly Law Digest
C.C.C.	Canadian Criminal Cases, 1893-196.
C.C.C.	Canadian Criminal Cases, 1963-1970
C.C.C.(2d)	Canadian Criminal Cases (Second Series), 1971-current
C.C.L.	Canadian Current Law, 1948-current
C.R.	Criminal Reports, 1946-1967
C.R.N.S.	Criminal Reports, (New Series) 1967-1978
C.R.(3d)	Criminal Reports, (Third Series), 1978-current
C.R.R.	Canadian Rights Reporter, 1982-current
C.W.L.S.	Canadian Weekly Law Sheet
Can.Abr.	Canadian Abridgement
Can.Abr.	Canadian Abridgement, (Second Edition).
D.L.R.	Dominion Law Reports, 1912-1922
D.L.R.	Dominion Law Reports, 1923-1955

D.L.R.(2d)	Dominion Law Reports, (Second Series), 1956-1968
D.L.R.(3d)	Dominion Law Reports, (Third Series), 1969-current
Man.L.R.	Manitoba Law Reports, 1884-1962 (to volume 29)
Man.R.	Manitoba Reports 1963-1978, (from volume 30)
Man.R.(2d)	Manitoba Reports (Second Series), 1979-current
N.B.R.(2d)	New Brunswick Reports (Second Edition), 1969-current
N.R.	National Reporter, 1974-current
N.S.R.(2d)	Nova Scotia Reports (Second Edition), 1970-current
N.W.T.R.	North-West Territories Reports 1887-1898
Nfld.& P.E.I.R.	Newfoundland and Prince Edward Island Reports, 1971-current
Nfld.L.R,	Newfoundland Law Reports, 1817-1949
O.L.R.	Ontario Law Reports, 1931-1973
O.R.	Ontario Reports, 1882-1930
O.R.	Ontario Reports, 1931-1973
O.R.(2d)	Ontario Reports, (Second Edition), 1973-current.
O.W.N.	Ontario Weekly Notes, 1909-1932
O.W.N.	Ontario Weekly Notes, 1933-1962
P.E.I.R.	Prince Edward Island Reports, 1971-current
R.F.L.	Reports of Family Law, 1971-1978
R.F.L.(2d)	Reports of Family Law, (Second Edition), 1978-current

S.C.R.	Canada Supreme Court Reports, 1876-1922
S.C.R.	Canada Supreme Court Reports, 1923-current
Sask.R.	Saskatchewan Reports, 1980-current
W.C.B.	Weekly Criminal Bulletin
W.L.R.	Western Law Reporter, 1905-1916
W.W.R.	Western Weekly Reports, 1912-1916; 1917-1950; 1955-1970
W.W.R.	Western Weekly Reports, 1971-current
W.W.R.(N.S)	Western Weekly Reports (New Series), 1951-1954 (Volumes 1-13)

United States of America

A.	Atlantic Reporter
A.L.R.	American Law Reports
Cal.Rptr.	California Reporter
F.	Federal Reporter
F.Supp.	Federal Supplement.
N.E.	North Eastern Reporter
N.W.	North Western Reporter
N.Y.Supp.	New York Supplement
P.	Pacific Reporter
S.	Southern Reporter
S.C.	Supreme Court Reporter
S.E.	South Eastern Reporter
S.W.	South Western Reporter.
U.S.	United States Supreme Court Reports

Other

All E.R.	All England Law Reports, 1936-current
A.L.R.	Australian Law Reports, 1973-current

APPENDIX "B": DEFINITION OF TERMS

APPENDIX "B": DEFINITION OF TERMS

A Priori

Lat. From the cause to the effect; from what goes before. A term used in logic to denote an argument founded on analogy, or abstract considerations, or one which, positing a general principle or admitted truth as a cause, proceeds to deduce from it the effects which must necessarily follow.

Audi Alteram Partem

Lat. Hear the other side, hear both sides. No man should be condemned unheard.

Burden of Proof

Lat. onus probandi; In the law of evidence, the necessity or duty of affirmatively proving a fact or facts in dispute on an issue raised between parties in a cause. The obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court.

Case Law

The aggregate of reported cases as forming a body of jurisprudence, or the law of a particular subject as evidenced or formed by the adjudged cases, in distinction to statutes and other sources of law.

Colour of Right (Amer. Color of Law)

The appearance or semblance, without the substance of legal right

Common Law

As distinguished from law created by the enactment of legislatures, the common law comprises the body of those principles and rules of action, relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgements and decrees of the courts recognizing, affirming, and enforcing such usages and customs; and, in this sense, particularly the ancient unwritten law of England.

Due Process of Law

Law in its regular course of administration through courts of justice . . . . An orderly proceeding wherein a person is served with notice, actual or constructive, and has an opportunity to be heard and to enforce and protect his rights before a court having power to hear and determine the case.

Fundamental Justice (Law)

The law which determines the constitution of government in a nature or state, and prescribes and regulates the manner of its exercise. The organic law of a nation or state; its constitution.

In Loco Parentis Doctrine

Lat. In the place of parent; instead of a parent; charged, factitiously, with a parent's rights, duties and responsibilities.

Judicial Notice

The act by which a court, in conducting a trial, or framing its decision, will, of its own motion or on request of a party, and without the production of evidence, recognize the evidence and truth of certain facts, having a bearing on the controversy at bar, which from their nature, are not properly the subject of testimony, or which are universally regarded as established by common notoriety, e. g., the laws of the state, international law, historical events, the constitution and course of nature, main geographical features, etc. The cognizance of certain facts which judges and jurors may properly take and act upon without proof, because they already know them. Such notice excuses party having burden of establishing fact from necessity of producing formal proof.

Natural Law

A system of rules and principles for the guidance of human conduct which, independently of enacted law or of the systems peculiar to any one people, might be discovered by the rational intelligence of man, and would be found to grow out of and conform to his nature, meaning by that word his whole mental, moral, and physical constitution.

Nemo Judex (nemo debet esse judex in propria causa)

Lat: No man ought to be a judge in his own case

Obiter Dicta

Lat. — By the way

Words of an opinion entirely unnecessary for the decision of the case . . . . A remark made, or opinion expressed, by a judge, in his decision upon a cause, "by the way," that is, incidentally or collaterally, and not directly upon the question before him, or upon a point not necessarily involved in the termination of the cause, or introduced by way of illustration, or analogy or argument. Such are not binding as precedent.

Prima Facie

Lat. At first sight; on the first appearance; on the face of it; so far as can be judged from the first disclosure;

presumably; a fact presumed to be true unless disproved by some evidence to the contrary.

Procedural Due Process

Those safeguards to one's liberty and property. Central meaning of procedural due process is that parties whose rights are to be affected are entitled to be heard and, in order that they may enjoy that right, they must be notified.

Parens Patriae

Lat. "parent of the country"
Refers traditionally to role of the state as sovereign and guardian of persons under legal disability such as infants, idiots and lunatics.

Precedents

An adjudged case or decision of a court, considered as furnishing an example or authority for an identical or similar case afterwards arising or a similar question of law.

Ratio Decidendi

Lat. The ground or reason of decision. The point in a case which determines the judgement.

Res gestae

Lat.Things done.
The "res gestae" rule is that where a remark is made spontaneously and concurrently with an affray, collision or the like, it carries with it inherently a degree of

credibility and will be admissible because of its spontaneous nature . . . . Res gestae is considered as an exception to the hearsay rule.

Situs

Lat. Situation; location; e. g., location or place of crime or business.

Site; position; the place where a thing is considered, for example, with reference to jurisdiction over it, or the right or power to tax it. It imports fixedness of location.

Stare Decisis, Doctrine

Lat. To abide by, or adhere to, decided cases.

Doctrine that when court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where the facts are substantially the same.

Statute Law

An act of the legislature declaring, commanding, or prohibiting something; a particular law enacted and established by the will of the legislative department of government; the written will of the legislature, solemnly expressed according to the forms necessary to constitute the law of the state.

Substantive Due Process

Such may be broadly defined as the constitutional guarantee that no person shall be arbitrarily deprived of his life, liberty or property; the essence of substantive due process is protection from arbitrary and unreasonable action.

Sui Juris

Lat: Of his own right

Having capacity to manage one's own affairs; not under legal disability to act for one's self

Ultra Vires...

Lat. Beyond; outside of; in excess of.

The term has a broad application and includes not only acts . . . prohibited but acts which are in excess of powers granted and not prohibited . . . . Ultra vires act of a municipality is one which is beyond the powers conferred upon it by law.

Void Ab Initio

A contract is null from the beginning if it seriously offends law or public policy in contrast to a contract which is merely voidable at the election of one of the parties to the contract. [In the school setting, this term applies to policy statements, written guidelines, and the like.]